Petition

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81-903

No. _____

In The
Supreme Court of the United States
October Term, 1981

LAKEWOOD BANK AND TRUST COMPANY,
Petitioner,

v.

HAROLD C. ABRAMSON, Trustee,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Counsel for Petitioner

November 10, 1981

QUESTION PRESENTED

The Bankruptcy Act has specified that certain transfers (including mortgages) are voidable if occurring within one year of the Petition in Bankruptcy.

The decision of the court below legislates that a second voidable event on the same property is completion of foreclosure within one year prior to bankruptcy. Can these two events more than one year apart both constitute "transfers"?

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1. All parties to this proceeding are shown in the caption.

2. A listing of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Petitioner herein, Lakewood Bank and Trust Company, a Texas corporation, required by Rule 28.1 of this Court, as of November 10, 1981, is as follows:

Lakewood La Vista Corporation, a Texas corporation
Lakewood Bancompany, a Texas corporation
La Vista Life Insurance Co., an Arizona corporation.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinion Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	2, 3
Reasons for Granting the Writ	3
(1) Conflict with Applicable Decisions of this Court	3, 4, 5
(2) Conflict with the Plain Language of § 67 (d) (5) of the Bankruptcy Act	5, 6, 7
Conclusion	7
Certificate of Service	8
Appendix	
Opinion and Judgment of the 5th Circuit Court of Appeals	app. A
Order and Decision of the United States District Court	app. B
Order Denying Petitioner's Petition for Rehearing and Suggestion for Rehearing en Banc	app. C
§ 67 (d) of the Bankruptcy Act entitled "Liens and Fraudulent Transfers" (11 USC § 107)	app. D
§ 1 (30) of the Bankruptcy Act entitled "Definitions" (11 U.S.C. § 1)	app. E

Durrett v. Washington National Insurance Company, 621F 2d 201 (5th Cir. 1980) app. F

Vernon's Texas Civil Statutes, Effect of Recording, Art. 6631 entitled "Deed, etc., Valid Against Subsequent Creditors" app. G

§ 67(f) of Bankruptcy Act, 30 Stat. at L. 505, Chap. 541, U. S. Comp. Stat. 1901, p. 3418 app. H

§ 67(a) of the Bankruptcy Act entitled "Liens and Fraudulent Transfers" (11 U.S.C. § 107) app. I

Table of Authorities

Cases:	Page
Durrett v. Washington National Insurance Company, 621 F 2d 201 (5th Cir 1980)	3, app. F
Emil v. Harley (1943), 63 S. Ct. 687	5
Re McKane (1907; D.C.) 152 Fed. 733, 158 Fed. 647	7
Metcalf v. Barker, 187 U.S. 165 (1902)	4, 5, 6, 7
Straton v. New, 283 U.S. 318 (1930)	4, 5, 6
Statutes:	
11 U.S.C. § 1, § 1 Bankruptcy Act	2, 5, 6, app. E
11 U.S.C. § 107, § 67(a) Bankruptcy Act	2, app. I
11 U.S.C. § 107, § 67(d) (2) Bankruptcy Act	2, 3, 7, app. D
11 U.S.C. § 107, § 67(d) (5) Bankruptcy Act	2, 5, app. D
28 U.S.C. § 1254 (1)	2
U.S. Comp. Stat., 1901, p. 3418, § 67(f) Bankruptcy Act	7, app. H
Vernon's Texas Civil Statutes, Article 6631	6, app. G
Miscellaneous:	
Collier on Bankruptcy, 14th edition	5

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In The

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October Term, 1981

LAKEWOOD BANK AND TRUST COMPANY,

Petitioner,

v.

HAROLD C. ABRAMSON, Trustee,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, LAKEWOOD BANK AND TRUST COMPANY, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding June 10, 1981.

OPINION BELOW

The opinion of the Court of Appeals, reported at 647 F.2d 547 (5th Cir. 1981), appears in Appendix "A" hereto. The Order of the District Court appears in Appendix "B" hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered June 10, 1981. Timely petition for rehearing en banc was denied August 14, 1981, and appears in Appendix "C" hereto. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Statutory provisions involved are § 67(d)(2) and (5) of the Bankruptcy Act (11 U.S.C. § 107), quoted in Appendix "D" hereto, stating criteria and specifying when "a transfer shall be deemed to have been made", and § 1 of the Bankruptcy Act (11 U.S.C. § 1) quoted in Appendix "E" hereto, defining "transfer" under the Act. This case arose under the Bankruptcy Act prior to the effective date of the Bankruptcy Reform Act of 1978.

STATEMENT OF THE CASE

On July 30, 1975, Debtors executed and delivered to Petitioner Bank their promissory note in the principal amount of $74,000, secured by a deed of trust on 73 acres of land which was recorded August 5, 1975.

On default by Debtors, nonjudicial foreclosure sale of the land was held August 3, 1976. On February 24, 1977, the Debtors filed their bankruptcy petition. Debtors' trustee in bankruptcy, respondent herein, brought suit in the United States District Court to set aside the foreclosure sale as being a fraudulent transfer under § 67 d (2) of the Bank-

ruptcy Act (11 U.S.C. § 107), such sale having been completed within one year prior to the filing of the Bankruptcy Petition. Jurisdiction was under 11 U.S.C. § 46a.

The District Court ruled that Section 67(d)(5) of the Bankruptcy Act specified that the "transfer" was deemed to have been made upon perfecting of the deed of trust lien (August 5, 1975) eighteen months prior to filing the Petition in Bankruptcy; therefore, the foreclosure sale is not subject to attack as a fraudulent conveyance.

Respondents concede that a "transfer" of the property occurred August 5, 1975, but assert that a second "transfer" also occurred by foreclosure sale seven months prior to filing the Petition. A divided Court of Appeals for the Fifth Circuit agreed with Respondent, citing as the sole authority its own ruling in the case of *Durrett v. Washington National Insurance Company*, 621 F 2d 201 (5th Cir. 1980 opinion attached in Appendix "F").

REASONS FOR GRANTING THE WRIT

THE COURT BELOW HAS DECIDED A MOST IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH (1) APPLICABLE DECISIONS OF THIS COURT AND (2) THE PLAIN LANGUAGE OF § 67(d)(5) OF THE BANKRUPTCY ACT.

(1) Conflict with Applicable Decisions of this Court.

The opinion of the Court of Appeals relied solely on its own 1980 decision in *Durrett*, overlooking the rule that it is the date a lien is *fixed* which controls on the question of

invalidity, not the date of *foreclosure*. This long established principle was announced by this Court in *Metcalf v. Barker*, 187 U.S. 165 (1902), and affirmed in *Straton v. New*, 283 U.S. 318 (1930). In *Metcalf*, this Court considered the then relevant section of the Act, § 67(f), which provided for a four month period of invalidity and stated:

> ". . . in our opinion the conclusion to be drawn from this language is that *it is the lien created by a levy, or a judgment, or an attachment, or otherwise*, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but *its validity is recognized*. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree *in enforcement* of an otherwise valid pre-existing lien is *not the judgment denounced* by the statute, which is plainly confined to judgments creating liens. *If this were not so the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial.*" (187 U.S. 165, 174) (emphasis added)

This Court in *Straton* observed

> ". . . the Federal Courts have with practical unanimity held that where a judgment which constitutes a lien on the debtor's real estate is recovered more than four months prior to the filing of the petition, the Bankruptcy Court is without jurisdiction to enjoin the prosecution of the creditor's action, instituted prior to the filing of a petition in bankruptcy, to bring about a judicial sale of the real estate." (283 U.S. 318, 326)

This Court in *Straton* also said,

> ". . . the bankruptcy law contains no express provision preserving liens acquired by legal proceedings more than four months before the petition is filed. But it is

clearly implied that they shall be saved from the operation of the law, for § 67(f) voids only liens obtained by legal proceedings within that period. It has consequently been held that those acquired earlier, if valid under state law, are preserved, and will be accorded priority by the Bankruptcy Court in distribution of the estate, in accordance with the applicable local law." (283 U.S. 318, 322)

Collier on Bankruptcy, 14th Edition, cited *Straton* and *Metcalf*, where it was observed that,

"Although the *Straton* case related to a lien obtained through legal proceedings, the facts were such that the Court cited with approval the many cases relating to liens created by non-procedural means such as that of a mortgage." (1 Collier on Bankruptcy, 14th Edition, § 2.63 at p. 356)

Collier, with extensive citation of authority, concludes at page 361;

"Accordingly, where a state foreclosure suit or other enforcement proceeding, based on a valid lien, is commenced before the filing of the bankruptcy petition, the State Court may proceed to judgment, sell the property and distribute the proceeds." (citing *Emil v. Harley* (1943), 63 S. Ct. 687 and other cases)

(2) Conflict with the Plain Language of § 67(d)(5) of the Bankruptcy Act.

The opinion of the Court of Appeals refers to the definition of "transfer" in Section 1(30) of the Act, but completely ignores the provision of Section 67(d)(5) specifying when a transfer under Section 67(d) "shall be deemed to have been made." That latter provision reads:

"(5) For the purposes of this subdivision d, a transfer shall be deemed to have been made at the time when it

became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but, if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of such petition."

Article 6631 (copied in Appendix G) of Vernon's Texas Civil Statutes establishes the Texas law that recording of the deed of trust herein (August 5, 1975 — eighteen months before filing petition in bankruptcy) is "the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein . . ."

The United States Supreme Court, as indicated above, has ruled repeatedly that if a *judgment* lien is fixed more than four months prior to bankruptcy, it is not subject to attack because *judicial* foreclosure proceedings occur within the 4-month period.

Section 1(30), relied upon by the court below, defines transfers as including those "by or without judicial proceedings."

Thus, although the cases cited generally relate to judicial foreclosure of judgment liens, and the present case relates to nonjudicial foreclosure of a mortgage lien, Section 1(30) expressly applies equally to liens obtained "by or without judicial proceedings."

This logical conclusion is further supported by the annotation to *Straton* appearing in 75 L. ed. at 1079 which first refers to the *Metcalf* doctrine and continues:

"... a judgment in foreclosure, obtained in a state court within the four months, upon a mortgage executed more

than four months prior to the filing of the petition in bankruptcy, is not a voidable lien under § 67(f) of the Bankruptcy Act, U.S.C. title 11, § 107, the bankruptcy court has no right to stay a sale under such a judgment. Re McKane (1907; D.C.) 152 Fed. 733, 158 Fed. 647."

There is no difference in principle between the four-month period of 67(f), quoted in *Metcalf*, 187 U.S. 165, 173, (Appendix H hereto) now 67(a), (Appendix I hereto) and the one-year period provided in 67(d)(2), involved in this case.

CONCLUSION

A fundamental concept of bankruptcy has been that when transfers, liens or attachments "are deemed to have been made" determines the voidability period. The Fifth Circuit has now ruled that although lien rights are fixed eighteen months before bankruptcy (or five years), if foreclosure is not completed before the statutory period, then foreclosure is a second voidable — fraudulent — transfer. The statute speaks of only one transfer and specifies when it is "deemed to have been made."

If not overturned, the decision below will add confusion and uncertainty to a broad spectrum of secured transactions.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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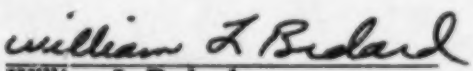
CERTIFICATE OF SERVICE

The undersigned, counsel for Petitioner, a member of the Bar of the Supreme Court of the United States, certifies that counsel for Respondent, Philip I. Palmer, Jr., has been served with three copies of the foregoing petition for a writ of Certiorari by depositing the document in a United States Post Office or mailbox, with first class postage prepaid, addressed to said counsel for Respondent at his post office address, 840 One Main Place, Dallas, Texas 75250.

All parties required to be served have been served.

Dated: November 10, 1981.



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APPENDIX

HAROLD C. ABRAMSON, Trustee,
Plaintiff-Appellant,

v.

LAKEWOOD BANK AND TRUST COMPANY,
Defendant-Appellee.

No. 79-1592.

United States Court of Appeals,
Fifth Circuit.

June 10, 1981

Trustee in bankruptcy brought suit to have foreclosure sale declared a fraudulent transfer under Bankruptcy Act. The United States District Court for the Northern District of Texas, at Dallas, Robert W. Porter, J., granted summary judgment for bank and refused to set aside alleged transfer, and trustee appealed. The Court of Appeals held that bank's nonjudicial foreclosure sale was a "transfer" within meaning of Bankruptcy Act, and as transfer occurred within one-year period prior to date of filing of bankruptcy petition, it was subject to being set aside as fraudulent if it was made without fair consideration.

Reversed and remanded.

Thomas A. Clark, Circuit Judge, dissented and filed opinion.

Bankruptcy ~~ 165(3.2)

Bank's nonjudicial foreclosure sale was a "transfer" within meaning of Bankruptcy Act, and as transfer occurred within

one-year period prior to date of filing of bankruptcy petition, it was subject to being set aside as fraudulent if it was made without fair consideration. Bankr.Act, §§ 1(30), 67(d)(2), 11 U.S.C.A. §§ 1(30), 107(d)(2).

See publication Words and Phrases for other judicial constructions and definitions.

Philip L. Palmer, Jr., Dallas, Tex., for plaintiff-appellant.

Storey, Armstrong, Steger & Martin, William L. Bedard, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GODBOLD, Chief Judge, SIMPSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

This is an appeal by Harold C. Abramson, acting as trustee in bankruptcy under Chapter XI of the old Bankruptcy Act,[1]

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[1]The foreclosure sale of the property under attack here occurred August 3, 1976. Appellant filed a petition under Chapter XI of the Bankruptcy Act on February 24, 1977. Sec. 403(a) of Pub.L. No. 95-598, Title I (Nov. 6, 1978), 92 Stat. 2549 provides as follows:

> A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act [Pub.L. 95-598] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

Since the events giving rise to this lawsuit occurred before the effective date of the new Bankruptcy Act the rights of the parties herein are governed by "repealed Title XI." When reference is made in this opinion to the "Act" or the "Bankruptcy Act" this same shall refer to "repealed Title XI."

former 11 U.S.C. § 1, *et seq.*, of the district court's order refusing to set aside an alleged transfer of real property within one year of the filing of debtor's bankruptcy petition. The district court granted summary judgment for the defendant-appellee, Lakewood Bank and Trust Company ("Lakewood Bank"), holding that the non-judicial foreclosure sale of the debtor's land did not constitute a "transfer" within the meaning of § 67(d) of the Bankruptcy Act. We reverse.

The facts can be stated briefly. The appellant, Abramson, brought this action in his capacity as court appointed trustee in the bankruptcy of Frank L. Johnson and Nina P. Johnson. The appellee, Lakewood Bank, is a Dallas bank. The bankrupts owned seventy-three acres of land in Kaufman County, Texas. In August of 1975, the bankrupts borrowed $74,000 on an installment loan. This loan was secured by a conventional deed of trust in favor of the bank on the seventy-three acres.

The deed of trust was recorded by the bank on August 5, 1975. When the bankrupts were unable to fulfill their financial obligations to the Lakewood Bank, a foreclosure sale was held on August 3, 1976, at which time the Lakewood Bank, through its agent Louis McClain, purchased the property for $65,000 cash. At the time of the foreclosure sale, the bankrupts owed approximately $71,000 on the mortgage. On February 24, 1977, the Johnsons filed a petition to be adjudicated bankrupt in the United States Bankruptcy Court for the Northern District of Texas.

The Trustee brought this action in March, 1978, to have the August, 1976, foreclosure sale declared a fraudulent transfer under § 67(d) of the Bankruptcy Act. While the deed of trust had been executed more than one year prior to the date of the filing of the bankruptcy petition, the actual

foreclosure sale occurred less than seven months before the filing. Section 67(d)(2) provided that "[e]very *transfer* made and every obligation incurred by a debtor within one year prior to the filing" of the bankruptcy petition "is fraudulent . . . as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent." 11 U.S.C. § 107(d)(2) (1966) (current version at 11 U.S.C. § 548(a) (1978)) (emphasis supplied).

In granting summary judgment for the Lakewood Bank, the district court held that for purposes of the Bankruptcy Act, there was only one "transfer" in this case and that it "occurred at the latest on August 5, 1975, more than 18 months prior to the adjudication of bankruptcy."

More than a year after the issuance of the district court's ruling in the *Abramson* case, this court of appeals decided the remarkably similar case of *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980). As to the narrow issue before us on this appeal, i. e., whether the bank's non-judicial foreclosure sale constituted a "transfer" within the meaning of the Act, we consider the holding in *Durrett* as controlling.

The word "transfer" was defined in Section 1 of the Act as including:

> the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage,

lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.

11 U.S.C. § 1(30).[2]

In *Durrett*, this court held that a Texas non-judicial foreclosure sale constituted a transfer within the meaning of § 67(d). There, a deed of trust to secure debt had been executed in 1969. In January, 1977, some nine days prior to the debtor's filing for bankruptcy, the trustee in the deed of trust sold the property at a non-judicial foreclosure sale as authorized by the deed of trust and Texas law. The debtor in possession under Chapter XI of the Bankruptcy Act brought suit to set aside the sale of the property as a voidable transfer.

In considering whether the foreclosure sale was a "transfer" made by the debtor in possession, a panel of this court set forth the definition of "transfer" and wrote:

> The comprehensive character of this definition leads us to conclude that the transfer of title to the real property of the debtor in possession pursuant to an arrangement under Chapter XI of the Act, by a trustee on foreclosure of a deed of trust, to a purchaser at the sale constitutes a "transfer" by debtor in possession within the purview of section 67(d). The actual transfer of title was made by Durrett to Fields, as trustee, via the deed of trust, executed April 7, 1969, to secure an indebtedness then owing to Southern and thereafter assigned to Washington. Possession of the property was retained by Durrett subject to the power of the trustee to sell

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[2]The current version of the definition of transfer is located at 11 U.S.C. § 101(40):

"transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest.

> and deliver possession of the property, on default, at a foreclosure sale. While the actual conveyance of title by Durrett was made on April 7, 1969, possession was retained until foreclosure of the deed of trust. The "transfer" within the contemplation of the Act, was not final until the day of the foreclosure sale, January 4, 1977. This was accomplished within the one-year period provided by section 67(d)(2), 11 U.S.C. § 107(d)(2).

Durrett v. Washington National Insurance Co., 621 F.2d at 204.

Accordingly, the foreclosure sale of the Johnsons' seventy-three acres was also a transfer within the meaning of the Act. As this transfer occurred within the one-year period, it is subject to being set aside as fraudulent if it was made without fair consideration. Therefore we reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

THOMAS A. CLARK, Circuit Judge, dissenting:

I dissent. Although I recognize our panel is bound by *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980), *Durrett* is simply wrong in its holding that a foreclosure sale is a transfer within the meaning of § 67(d). Subparagraph (2) of that section of the former Bankruptcy Act reads in part as follows:

> Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent . . . if made or incurred without fair consideration by a debtor . . . without regard to his actual intent; . . .

11 U.S.C. § 107(d)(2).

A foreclosure sale by a mortgagee or trustee is not a transfer *by* the debtor, although done in his name pursuant to a

power of sale in the mortgage or deed of trust. The debtor's act which triggers foreclosure is the failure to fulfill some obligation in the promissory note which is secured by the mortgage or deed of trust. The creditor than declares the obligation due, forecloses, and sells at a public sale to the highest bidder. The mortgagor-trustor/bankrupt does nothing but default — that cannot be translated into a "transfer." It is not a voluntary conveyance on his part. The power of sale vested in the mortgagee or trustee, when coupled with an interest as here, is a valuable property right acquired by that party at the time of the execution of the initial mortgage or trust deed.[1] When that time is more than twelve months before the filing of the bankruptcy petition, the power of sale is vested absolutely in the mortgagee or trustee.

It is basic mortgage law that at the time of the foreclosure sale the purchaser (who may or may not be the mortgagee or trustee) takes the same title to the property which the mortgagor or trustor had at the time of the initial mortgage or trust deed, subject only to property taxes (and perhaps some statutory intervening limitations as changes in zoning, etc., and the right of redemption by the mortgagee with a specified number of days granted statutorily in some states), and free and clear of any intervening liens or mortgages placed against the property by the debtor or any judgment creditor.

By our decision here and in *Durrett* we cast a cloud upon mortgages and trust deeds. Foreclosure within twelve months

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[1]Technically a mortgage does not contain a power of sale, while a deed of trust or deed to secure debt does contain such a power. However, in common parlance the generic term "mortgage" embraces all forms of instruments creating a lien on realty for the purpose of securing a debt. Many contain powers of sale in order to avoid court proceedings which are necessary in strict mortgage states.

before a filing creates a sale voidable by a trustee in bankruptcy if the public sale did not bring a "fair consideration." It is generally known that such sales do not bring the best price, but most states, including Texas, mandate public sales when foreclosure is the creditor's remedy. Many states, but not Texas, prohibit a deficiency judgment against the debtor unless the mortgagee obtains confirmation of the sale through a court proceeding where the fairness of the consideration is adjudicated.[2] Thus in those states a mortgagee who did not obtain judicial confirmation would be prohibited from filing a claim in the bankruptcy proceeding for the amount of the deficiency.

The cloud created over mortgages and trust deeds by making foreclosure sales subject to being voided by a bankruptcy trustee will naturally inhibit a purchaser other than the mortgagee from buying at foreclosure. This tends to depress further the prices of foreclosure sales and thus increase the potential size of the deficiency in each foreclosure in all six states comprising this circuit.

It is interesting to me that *Durrett* is the first case treating this problem — after 90 years of bankruptcy law and mortgages of a time greater than the memory of man. It again establishes what an imaginative lawyer can do when he adds persuasion.

I would affirm.

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2. *See, e. g., Ga.Code Ann.* § *67-1503* (confirmation of foreclosure sales under powers).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HAROLD C. ABRAMSON,
Trustee,

vs. No. CA3-78-0281-F

LAKEWOOD BANK AND
TRUST COMPANY,

ORDER

FACTS

On July 30, 1975, Frank L. Johnson and Nina P. Johnson executed and delivered to Lakewood their promissory note in the principal amount of $74,000.00. This was secured by a deed of trust covering 73 acres of land located in Kaufman County, Texas which was simultaneously executed and delivered by the Johnsons to Lakewood, and filed for record in the Deed of Trust Records of Kaufman County, Texas, on August 5, 1975 at 10:05 a.m. (Vol. 221, page 843, Deed of Trust Records of Kaufman County, Texas).

On July 3, 1976, the Johnsons were notified by Lakewood that they had failed to make payment and that the note was in default. Notice was posted and a foreclosure sale was held on August 3, 1976, at which time, Lakewood, by its representative Louis McClain, purchased the property for $65,000.00 cash. On February 24, 1977, the Johnsons filed

a petition to be adjudicated bankrupt in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division.

ISSUE BEFORE THE COURT

The parties are in essential agreement as to the facts just stated. They disagree about the time when the 73 acre tract of land was "transferred" by the Johnsons to Lakewood. Lakewood contends that the "transfer", as that term is used in the Bankruptcy Act and defined in § 1(30) and § 67(d), occurred at the latest on August 5, 1975 when the deed of trust was recorded in the records of Kaufman County, Texas. The trustee apparently concedes, on page 2 of its brief in opposition to defendant's motion for summary judgment filed June 2, 1978, that a "transfer" did occur on that date. Trustee, however, contends that this is not the "transfer" which the Trustee attacks in this cause of action. Trustee alleges that another "transfer" occurred on August 3, 1976 when the property was sold at a foreclosure sale.

The fixing of the date of "transfer" is significant because if Lakewood is correct, the "transfer" by the Johnsons to Lakewood of the deed of trust cannot be attacked under the Bankruptcy Act as a fraudulent conveyance. If the Trustee is correct, however, the foreclosure sale might be set aside under the fraudulent conveyance provisions.

THE COURT'S DECISION

Section 67(e)(5) of the Bankruptcy Act provides that for the purposes of subdivision d, "a transfer shall be deemed to have been made at the time when it became so far perfected that no bonafide purchaser from the debtor could thereafter acquired any right in the property so transferred

superior to the right of the transferee therein . . ." Section 1(30) of the Bankruptcy Act further provides, in defining the word "transfer" that a transfer includes the fixing of a lien upon property, a security, a lien, or the retention of a security title to property delivered to a debtor.

In this case, no bonafide purchaser from the Johnsons would have acquired a right in the 73 acres superior to that of Lakewood from and after the date of the execution, delivery, and recordation of the deed of trust. Therefore, the "transfer" occurred at the latest on August 5, 1975, more than 18 months prior to the adjudication of bankruptcy, and plaintiff has no cause of action as a matter of law against Lakewood Bank & Trust Co. in this case. My decision is supported by *Menear, Trustee vs. Morgantown Community Association*, 235 F.2d 354 (4th Cir. 1956). In that case a bankrupt executed a deed of trust on the real estate to secure an indebtedness due the association. The deed of trust was properly recorded, and was filed several years prior to bankruptcy. A creditor retained an option to repurchase the property at a future time of its choosing for a sum certain. Within one year of the bankruptcy, the creditor exercised its option to repurchase the property and reconveyance was accomplished by a State Court appointed Commission pursuant to an order of the Court. The Trustee attacked the conveyance but the Circuit Court found for the creditor and refused to disturb the reconveyance of the property pursuant to the option contract of the parties. While this case involved an option to repurchase, and not a foreclosure sale, I think the principle is analogous to the situation in this case.

The Trustee has argued strenuously that there should be two "transfers", one which occurred when the Johnsons granted Lakewood Bank a security interest in the property

and another "transfer" which occurred through the sale of the property at foreclosure. The Trustee has cited no case authority to the Court which would justify this position and the language of the Bankruptcy Act suggests that in this type of case there is only one "transfer".

The motion of Lakewood Bank & Trust Co. for summary judgment is hereby GRANTED.

It is so ORDERED.

/s/ ROBERT W. PORTER
United States District Judge

Date: February 15, 1979

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1592

HAROLD C. ABRAMSON,
Trustee,

Plaintiff-Appellant,

versus

LAKEWOOD BANK AND TRUST COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 10, 1981, 5 Cir., 198..., ... F.2d .....).

(August 14, 1981)

Before GODBOLD, Chief Judge, SIMPSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

Entered for the Court:

THOMAS A. CLARK
United States Circuit Judge

SECTION SIXTY-SEVEN (11 U.S.C. § 107)

§ 67. Liens and Fraudulent Transfers.

d. (1) For the purposes of, and exclusively applicable to, this subdivision d: (a) "Property" of a debtor shall include only his nonexempt property; (b) "debt" is any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent; (c) "creditor" is a person in whose favor a debt exists; (d) a person is "insolvent" when the present fair salable value of his property is less than the amount required to pay his debts; and to determine whether a partnership is insolvent, there shall be added to the partnership property, the present fair salable value of the separate property of each general partner in excess of the amount required to pay his separate debts, and also the amount realizable on any unpaid subscription to the partnership of each limited partner; and (e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained.

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered

insolvent, without regard to his actual intent; or (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; or (c) as to then existing and future creditors, if made or incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature; or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.

(3) Every transfer made and every obligation incurred by a debtor who is or will thereby be rendered insolvent, within four months prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent, as to then existing and future creditors: (a) if made or incurred in contemplation of the filing of a petition initiating a proceeding under this Act by or against the debtor or in contemplation of liquidation of all or the greater portion of the debtor's property, with intent to use the consideration obtained for such transfer or obligation to enable any creditor of such debtor to obtain a greater percentage of his debt than some other creditor of the same class, and (b) if the transferee or obligee of such transfer or obligation, at the time of such transfer or obligation, knew or believed that the debtor intended to make such use of such consideration. The remedies of the trustee for the avoidance of such transfer or obligation and of any ensuing preference shall be cumulative: *Provided, however*, That the trustee shall be entitled to only one satisfaction with respect thereto.

(4) Every transfer of partnership property and every partnership obligation incurred within one year prior to the filing of a petition initiating a proceeding under this Act by or against the partnership, when the partnership is insolvent or will be thereby rendered insolvent, is fraudulent as to partnership creditors existing at the time of such transfer or obligation, without regard to actual intent if made or incurred (a) to a partner, whether with or without a promise by him to pay partnership debts, or (b) to a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

(5) For the purposes of this subdivision d, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but, if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of such petition.

(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this Act, which is fraudulent under this subdivision d against creditors of such debtor having claims provable under this Act, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value: *Provided, however*, That the court may, on due notice, order such transfer or obligation to be preserved for the benefit of the estate and, in such event, the trustee shall succeed to and may enforce the rights of such transferee or obligee: *And provided further*, That such purchaser, lienor, or obligee, who without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision d, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment.

THE BANKRUPTCY STATUTE OF 1898

ENACTED JULY 2, 1898

AS AMENDED TO OCTOBER 1, 1973

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Bankruptcy Act". (*This Short Title was added by* 64 STAT. 1113 (1950)).

CHAPTER I

Definitions

SECTION ONE (11 U.S.C. § 1)

§ 1. Meaning of Words and Phrases. The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

---

(30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;

J. W. DURRETT, SR., Plaintiff-Appellant,

v.

The WASHINGTON NATIONAL INSURANCE CO. et al.,
Defendants-Appellees.

No. 78-3351.

**UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.**

July 11, 1980.

Debtor in possession under Chapter XI of Bankruptcy Act sought to set aside and vacate an alleged transfer of real property effectuated nine days prior to filing of petition for arrangement, charging that transfer was voidable. The United States District Court for the Northern District of Texas, William M. Taylor, Jr., J., 460 F.Supp. 52, denied relief, and appeal was taken. The Court of Appeals, Orma R. Smith, District Judge, sitting by designation, held that: (1) payment of $115,000 for transfer of property under deed of trust pursuant to foreclosure sale was not "fair" consideration or a "fair equivalent" within meaning of section of Bankruptcy Act governing fraudulent transfers, and (2) transfer accomplished by trustee pursuant to power of sale provision of deed of trust was a "transfer made" by debtor in possession within contemplation of section of Bankruptcy Act governing fraudulent transfer.

Judgment vacated; remanded with directions.

1. Bankruptcy 181

Payment of $115,000 for transfer of property under deed of trust pursuant to foreclosure sale was not "fair" consideration or a "fair equivalent" within meaning of section of Bankruptcy Act governing fraudulent transfers. Bankr.Act, § 67(d)(1), (e)(1), 11 U.S.C.A. § 107(d)(1), (e)(1).

See publication Words and Phrases for other judicial constructions and definitions.

2. Bankruptcy 958

Transfer of title to real property of debtor in possession pursuant to arrangement under Chapter XI of Bankruptcy Act, by trustee on foreclosure of deed of trust, to purchaser at sale constituted a "transfer made" by debtor in possession within purview of section of Bankruptcy Act governing fraudulent transfers. Bankr.Act, § 67(d), 11 U.S.C.A. § 107(d).

See publication Words and Phrases for other judicial constructions and definitions.

Philip I. Palmer, Jr., Dallas, Tex., for plaintiff-appellant.

Larry G. Alexander, Edith DeBusk, Dallas, Tex., for Jack Mitchell.

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN and POLITZ, Circuit Judges, and SMITH*, District Judge.

ORMA R. SMITH, District Judge:

This appeal concerns an action instituted in the United States District Court for the Northern District of Texas, wherein plaintiff Jack W. Durrett, Sr. (herein "Durrett"), acting as debtor in possession under Chapter XI of the

Bankruptcy Act,[1] 11 U.S.C. §§ 701, et seq., seeks to set aside and vacate an alleged transfer of real property effectuated nine days prior to the filing of a Petition for an Arrangement under Chapter XI. Durrett charges that the transfer is voidable under section 67(d) of the Act, 11 U.S.C. § 107(d)[2]. The district court held that the non-judicial sale involved in the litigation constituted a transfer within the meaning of section 67(d). However, the court determined

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*District Judge of the Northern District of Mississippi, sitting by designation.

[1]The sale of the property under attack here, occurred January 4, 1977. Plaintiff filed a Petition for Arrangement Under Chapter XI of the Bankruptcy Act on January 13, 1977). Section 403(a) of Pub.L. No. 95-598, Title 1 (Nov. 6, 1978), 92 Stat. 2549; provides as follows:

> A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act [Pub.L. 95-598] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

Because the acts giving rise to this litigation occurred before the effective date of the new bankruptcy act, Pub.L. 95-598, the rights of the litigants are governed by "Repealed Title 11". When reference is made herein to the "Act" or the "Bankruptcy Act" the same shall refer to "Repealed Title 11".

[2]Section 67(d) of the Act provides in pertinent part:

> (1) For the purposes of, and exclusively applicable to, this subdivision: . . . (e) consideration given for the property or obligation of a debtor is "fair" (i) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred . . . .
>
> (2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; . . .

that the amount paid by the purchaser at the sale conducted by a trustee in the foreclosure of a deed of trust executed by Durrett, the indebtedness which it secured being than in default, was a "fair" consideration and a "fair equivalent" within the meaning of section 67(d)(1), (e)(1) of the Act, 11 U.S.C. § 107(d)(1), (e)(1). The court denied the relief sought by Durrett and he appeals. We reverse.

A review of the record on appeal reflects the following facts. On April 7, 1969, Durrett executed a note in the amount of $180,000.00 in favor of Southern Trust and Mortgage Company (hereafter "Southern"). The note was secured by a deed of trust upon the subject real property. Southern, on April 7, 1969, assigned the trust deed and note to defendant, The Washington National Insurance Company (hereafter "Washington"). Defendant J. H. Fields, Jr. (hereafter "Fields"), was named as the trustee in the deed of trust. The deed of trust contained a provision for a public sale of the real property thereby conveyed, in case of default in payment of the indebtedness.

On December 13, 1976, Fields, in his capacity of trustee, posted the property for foreclosure sale. The sale was held

> (6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this title, which is fraudulent under this subdivision against creditors of such debtor having claims provable under this title, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value: . . .
>
> *And provided further*, That such purchaser, lienor, or obligee, who without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment. . . . (Emphasis in original).

[2]The district court's conclusion of law refers to Mitchell's payment as being the sum of $115,000.00. The findings of fact, however, stated the payment to be $115,400.00. The record reflects the latter to be the correct bid price.

on January 4, 1977. Defendant Shannon Mitchell, Sr. (hereafter "Mitchell"), appeared at the sale and bid the sum of $115,400.00 for the property. This was the only bid received by the trustee at the sale. The amount of the bid was the exact amount necessary to liquidate the indebtedness secured by the deed of trust. Upon receipt of the bid price, Fields executed and delivered to Mitchell a trustee's deed to the property. The parties agree that Mitchell did not have any actual fraudulent intent when making the purchase. He responded to the notice of sale and became the successful bidder. Mitchell and Durrett are the only parties now interested in the case.

Durrett contends that the transfer of the property, pursuant to foreclosure of the deed of trust, is voidable under the provision of section 67(d).

The district court dismissed the complaint after a non-jury trial. In its findings of fact, the court held that the fair market value of the property on January 4, 1977, the date of the foreclosure sale, was the sum of $200,000.00.

The parties do not take issue with this finding. Both agree that it is not clearly erroneous. *See*, Rule 52(a), Fed.R.-Civ.P.; *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 377 (5th Cir. 1977).

Durrett asserts, on appeal, only one assignment of error, i.e., "Is $115,400.00 payment for an asset worth $200,000.00, a 'fair equivalent' ".

In consideration of the issue of "fair equivalent", we should determine by what standard we are to judge the district court's conclusion of law that the amount paid for the property, $115,000.00, is "fair" consideration and a "fair equivalent" within the meaning of section 67(d)(1), (e)(1).[3]

We have held that our review of conclusions of law by the district court in non-jury cases is not restricted by the "clearly erroneous" rule and will be reversed if incorrect. *See, Ealy v. Littlejohn*, 569 F.2d 219, 229 n. 31 (5th Cir. 1978). *See also, Buchanan v. United States Postal Service*, 508 F.2d 259, 267 n. 24 (5th Cir. 1975).

The question with which we are confronted is whether the district court's conclusion of law on the "fair equivalent" issue is incorrect, when considered in light of the record made in the district court and the applicable case law.

[1] The parties have cited a number of cases which deal with this issue. A great percentage of these, however, involve factual situations quite different from the facts which exists in this appeal. Here, there is involved only one event, i.e., one parcel of real estate sold at a foreclosure sale for a price which is approximately 57.7 percent of the fair market value of the property. Is the price paid a "fair equivalent" for the transfer of the property? We hold that it is not.

The sale of real property was involved in one of the cases cited by Durrett, *Schafer v. Hammond*, 456 F.2d 15 (10th Cir. 1972). There the Tenth Circuit affirmed a holding by the district court that a sale of real property for approximately 50 percent of its market value was void for lack of a fair consideration. Here, Mitchell paid slightly more than 50 percent (57.7%) for the property involved. The sale, however, deprived the bankruptcy estate of an equity in the property of $84,600.00, if computed on the $200,000.00 market value fixed by the district court.

We have been unable to locate a decision of any district or appellate court dealing only with a transfer of real property as the subject of attack under section 67(d) of

the Act, which has approved the transfer for less than 70 percent of the market value of the property.

Assuming, arguendo, that we should review the district court's conclusion of law as a finding of fact under the "clearly erroneous" standard, the results would be the same. We cannot affirm the district court on this issue. Our review of the entire evidence leaves us with a definite and firm conviction that the price which Mitchell paid for the property at the trustee's sale was not a "fair equivalent" for the property. Under such circumstances, it is our duty to declare the transfer voidable under section 67(d). *See, United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948); *George W. B. Bryson & Co., Ltd. v. Norton Lilly & Co., Inc.*, 502 F.2d 1045, 1049 (5th Cir. 1974). *See also, Tulia Feedlot, Inc. v. United States*, 513 F.2d 800, 807 (5th Cir.), *cert. denied*, 423 U.S. 947, 96 S.Ct. 362, 46 L.Ed.2d 281 (1975); *Ealy v. Littlejohn, supra* at 229 n. 30.

The defendant-appellee Mitchell seeks to sustain the final judgment of the district court on the ground that the transfer accomplished by the trustee pursuant to the power of sale provision of the deed of trust was not a transfer *made* by the debtor in possession within the contemplation of section 67(d). We find this position to be without merit.

The word "transfer" is defined in section 1 of the Act, 11 U.S.C. § 1. Section 1 provides in pertiment part:

> The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:
>
> (30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein

> or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise, the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;

[2] The comprehensive character of this definition leads us to conclude that the transfer of title to the real property of the debtor in possession pursuant to an arrangement under Chapter XI of the Act, by a trustee on foreclosure of a deed of trust, to a purchaser at the sale constitutes a "transfer" by debtor in possession within the purview of section 67(d). The actual transfer of title was made by Durrett to Fields, as trustee, via the deed of trust, executed April 7, 1969, to secure an indebtedness then owing to Southern and thereafter assigned to Washington. Possession of the property was retained by Durrett subject to the power of the trustee to sell and deliver possession of the property, on default, at a foreclosure sale. While the actual conveyance of title by Durrett was made on April 7, 1969, possession was retained until foreclosure of the deed of trust. The "transfer" within the contemplation of the Act, was not final until the day of the foreclosure sale, January 4, 1977. This was accomplished within the one-year period provided by section 67(d)(2), 11 U.S.C. § 107(d)(2). This conclusion is supported by reliable and ample authority. *See* 1 Collier on Bankruptcy, § 1.30 at 130.28(2)(3) (14th ed. 1967), where it is said: "[t]he present definition covers not only alienations of title but includes surrender of possession". *See also*, 4 Collier on Bankruptcy, § 67.29 at 471, et seq.

For the reasons herein given, the judgment of the district court must be vacated, and the cause reversed with directions.

Upon remand, the district court shall enter judgment for plaintiff-appellant, directing the rescission of the transfer under section 67(d) of the Act, dealing with the property in such manner as will protect Mitchell's equity therein. Section 67(d)(6), 11 U.S.C. § 107(d)(6).

JUDGMENT VACATED, REMANDED WITH DIRECTIONS.

VERNON'S TEXAS CIVIL STATUTES

EFFECT OF RECORDING

Art. 6631. [6828] [4612] [4334] Deed, etc., valid against subsequent creditors

Every conveyance, covenant, agreement, deed, deed of trust or mortgage or certified copies of any such original conveyance, covenant, agreement, deed, deed of trust or mortgage copied from the deed or mortgage records of any county in the State where the same has been regularly recorded, although the land may not have been situated in the county where such instrument was recorded, and which shall have been acknowledged, proved or certified according to law, may be recorded in the county where the land lies; and when delivered to the clerk of the proper court to be recorded shall take effect and be valid as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors from the time when such instrument shall have been so acknowledged, proved or certified and delivered to such clerk to be recorded, and from that time only. All certified copies filed and recorded under the provisions of this article shall take effect and be in force from the time such certified copy was filed for record. Nothing herein shall be construed to validate an invalid instrument.

Acts 1895, p. 157; P.D. 4994; G.L. vol. 10, p. 887.

Section 67(f) provides: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien *shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect." [30 Stat. at L. 505, chap. 541, U.S. Comp. Stat. 1901, p. 3418.]

SECTION SIXTY-SEVEN (11 U.S.C. § 107)

§ 67. Liens and Fraudulent Transfers. a. (1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this Act: *Provided, however*, That if such person is not finally adjudged a bankrupt in any proceeding under this Act and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it had not been nullified and voided.

(2) If any lien deemed null and void under the provisions of paragraph (1) of this subdivision a, has been dissolved by the furnishing of a bond or other obligation, the surety on which has been indemnified directly or indirectly by the transfer of or the creation of a lien upon any of the nonexempt property of a person before the filing of a petition initiating a proceeding under this Act by or against him, such indemnifying transfer or lien shall also be deemed null and void: *Provided, however*, That if such person is not finally adjudged a bankrupt in any proceeding under this Act, and if no arrangement or plan is proposed and confirmed, such transfer or lien shall be deemed reinstated with the same effect as if it had not been nullified and voided.

(3) The property affected by any lien deemed null and void under the provisions of paragraphs (1) and (2) of this subdivision a shall be discharged from such lien, and such property and any of the indemnifying property transferred

to or for the benefit of a surety shall pass to the trustee or debtor, as the case may be, except that the court may on due notice order any such lien to be preserved for the benefit of the estate, and the court may direct such conveyance as may be proper or adequate to evidence the title thereto of the trustee or debtor, as the case may be: *Provided, however*, That the title of a bona-fide purchaser of such property shall be valid, but if such title is acquired otherwise than at a judicial sale held to enforce such lien, it shall be valid only to the extent of the present consideration paid for such property.

(4) The court shall have summary jurisdiction of any proceeding by the trustee or debtor, as the case may be, to hear and determine the rights of any parties under this subdivision a. Due notice of any hearing in such proceeding shall be given to all parties in interest, including the obligee of a releasing bond or other like obligation. Where an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, the court, upon application of any party in interest, shall in the same proceeding ascertain the value of such property or lien, and if such value is less than the amount for which such property is indemnity or than the amount of such lien, the transferee or lienholder may elect to retain such property or lien upon payment of its value, as ascertained by the court, to the trustee or debtor, as the case may be, within such reasonable times as the court shall fix.

(5) The liability of a surety under a releasing bond or other like obligation shall be discharged to the extent of the value of the indemnifying property recovered or the indemnifying lien nullified and voided by the trustee or debtor, or, where the property is retained pursuant to the provisions of paragraph (4) of this subdivision a, to the extent of the amount paid to the trustee or debtor.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 12 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-903

In the Supreme Court of the United States

OCTOBER TERM, 1981

LAKEWOOD BANK AND TRUST COMPANY,
PETITIONER

VS.

HAROLD C. ABRAMSON, TRUSTEE
RESPONDENT

PETITION FOR REHEARING
ON DENIAL FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE IN OPPOSITION TO
PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Supplemental Statement of Case 1

Summary of Argument 2

Reasons Why Petition Should Be Denied 3

Conclusion 8

Certificate of Service 9

TABLE OF AUTHORITIES

11 U.S.C. §96, Bankruptcy Act §60 5

11 U.S.C. §107, Bankruptcy Act §67c 6

11 U.S.C. §107d(2),
Bankruptcy Act §107d(2) 6

11 U.S.C. §107d(6),
Bankruptcy Act §107d(6) 6

TEXTS:

4 *Collier, Bankruptcy*
(14th ed.) §67.01 5

39 *Tex. Juris 2d Mortgages*
and Trust Deeds §2 3

39 *Tex. Juris 2d Mortgages*
and Trust Deeds §7 3

39 *Tex. Juris 2d Mortgages*
and Trust Deeds §138 4

39 *Tex. Juris 2d Mortgages*
and Trust Deeds §139 4

39 *Tex. Juris 2d Mortgages*
and Trust Deeds §140 4

39 *Tex. Juris 2d Mortgages*
and Trust Deeds §206 4

39 *Tex. Juris 2d Mortgages*
and Trust Deeds §208 3

39 *Tex. Juris 2d Mortgages*
and Trust Deeds §211 3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

LAKEWOOD BANK AND TRUST COMPANY,
PETITIONER

VS.

HAROLD C. ABRAMSON, TRUSTEE
RESPONDENT

STATEMENT OF THE CASE

The following additional facts are necessary to present the issue:

a. At the foreclosure sale the Respondent Bank itself was the purchaser.

b. At the time of the foreclosure, the value of the land was $120,000.00 but was purchased by the Bank for a $65,000.00 credit upon the $71,000.00 debt balance.

c. The suit by the Trustee is against the Bank in

its capacity as purchaser and not in its capacity as lender.

SUMMARY OF ARGUMENT

This case turns upon the issue of Texas Real Estate Mortgage Law and the old Bankruptcy Act repealed in 1979.

A Deed of Trust under Texas law is a security device. The equity in the property is property of the Debtor. That equity may be of little or considerable worth, depending upon the balance of the lien and the value of the land.

The old Bankruptcy Act allowed avoidance of any transfer, voluntary or otherwise, of a Bankrupt's property if for less than a "fair consideration."

This suit is against the purchaser at a foreclosure sale alleging that it purchased the Bankrupt's equity at less than a fair consideration. Summary judgment against the Trustee was granted because the lien being foreclosed was valid. The Fifth Circuit reversed and remanded for trial because the validity of the lien is not the issue. The purchaser at such sale may still be sued as purchaser, and it is of no consequence that it is also the lienholder.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

This case presents an issue of the Texas Real Estate Mortgage law under the old Bankruptcy Act.

The Deed of Trust, under Texas law, is a security instrument. The technique it employs is the transfer of legal title to a Trustee who is also granted a power to sell upon default in payment. 39 *Tex. Jur.2d Mortgages and Trust Deeds* §2, p.11.

The mere execution of the Deed of Trust does not divest the obligor of title. 39 *Tex. Jur. 2d Mortgages and Trust Deeds* §7, p.15 He still retains his estate in the land including the right to the equity, which he is free to convey, occupy, lease, or encumber further. 39 *Tex. Jur. 2d Mortgages and Trust Deeds* §208, p.270-271.

Foreclosure by sale of the land under the power contained in the Deed of Trust cuts off this estate in the Debtor with no further rights of redemption under Texas law. 39 *Tex. Jur 2d Mortgages and Trust Deeds* §211, p.274.

Even Texas law recognizes that a Deed of Trust foreclosure is a "harsh method" of collecting debts. 39

Tex. Jur. 2d Mortgage and Trust Deeds §138, p. 178. The sale is conducted by the Turstee, usually an employee or attorney for the lender, on the Court house steps at any time between 10:00 A.M. and 4:00 P.M. on foreclosure day. The sale is normally attended only by the lender and the Trustee, with the only bid being such sum as the lender chooses. 39 *Tex. Jur. 2d Mortgages and Trust Deeds* §§139, 140, p. 179-182. Unlike many other states which also allow a Deed of Trust foreclosure, Texas permits the lender to obtain a personal judgment for the deficiency. 39 *Tex. Jur. 2d Mortgages and Trust Deeds* §206, p. 68-269.

Under the facts of this case, at sunrise on the date of the foreclosure, the Debtors owned real estate worth $120,000.00 subject to a lien debt of only $71,000.00 and thus had an equity and net worth of $49,000.00. By sundown on foreclosure day the land and the equity are ot only gone, but also the Debtors faced a $6,000.00 personal judgment upon the deficiency. Somehow their personal balance sheet had suffered a loss of $55,000.00, moving them in the process from solvent to insolvent. Still the Bank vigorously argues nothing was transferred on this day.

With all due respect, something has happened. the creditors are now faced with the prospect of collec-

ting their claims from Debtors now insolvent. At the same time, the Bank has improved its own balance sheet by taking in land worth $120,000.00 for a $65,000.00 credit. During the day of foreclosure the Bank received by transfer the full fee simple title when it previously had held only a mortgage. That transfer is the transfer under attack. It is a separate matter with different tests from the issue of when, or even whether, the lien instrument itself is properly recorded. It is quite possible, as here, to have a suit which attacks the transfer of the fee simple title by the foreclosure process without challenging the validity of the lien which was foreclosed.

When there are insufficient assets to pay all creditors, then the basic policy is that what assets are available should be divided equally. 4 *Collier, Bankruptcy* (14the Ed.) §67.01, p. 15. Recognizing that a Debtor in failing circumstances is apt to be unable to protect his estate from dismemberment or even to prefer certain favored creditors above others, the several Bankruptcy Acts have all included comprehensive sections to permit avoidance by the Trustee of such inequitable distributions before bankruptcy.

Under the Bankruptcy Act of 1898, the principal avoidance powers were found in Section 60 (11 U.SC. § 96) avoiding preferential transfers within four

months of bankruptcy; Section 67 (11 U.S.C. §107) avoiding statutory liens in Section C and fraudulent transfers in Section D; and, Section 70c, the so-called "strong arm clause" avoiding unrecorded liens and mortgages. Each section, of course, carries its own requirements and limitations.

In Section 67d(2)(a) of the Bankruptcy Act is found the precise statute under which the Trustee filed this suit, namely to avoid transfer for less than a "fair consideration." If the Trustee can meet his burden of proof, then the inequitable transfer may be avoided for the benefit of all creditors.

In the Congressional scheme, however, where the purchaser has acted in actual good faith, notwithstanding that he may have paid less than fair value, he is still protected by being granted a lien upon the property recovered to the extent of the consideration actually given. Bankruptcy Act, Section 67d(6), 11 U.S.C. §107d(6).

Here the good faith of the Bank was not questioned, so that if the Turstee is successful upon the merits, the Bank's lien will be re-instated to the amount of the $65,000.00 which it actually credited upon the lien.

In all cases, if the Trial Court finds the necessary good faith, the horrible event which so troubles the Petitioner is only that its lien will be reinstated but that the equity might be realized for the benefit of all creditors.

The cases cited by Petitioner are not at variance with this principle. Both of those cases deal with problems of the summary jurisdiction of the Bankruptcy Court, a concept not carried forward in the Bankruptcy Reform Act of 1978 and the avoidance of statutory liens, rather than consensual mortgages, under Section 67c. 11 U.S.C.107c. Both decisions are also prior to the extensive Chandler Act Amendments in 1938 to the old Bankruptcy Act.

CONCLUSION

Not only is the decision below a correct statement of the law, but the issues involved are not sufficient general importance to justify the time required for an opinion of this Court. The Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, a member of the bar of the Supreme Court of the United States, certifies that counsel for Petitioner, William L. Bedard, has been served with three copies of the foregoing Response to Petition for a Writ of Certiorari by depositing the documents in a United States Post Office or mail box, with first class postage prepaid, addressed to said counsel for petitioner at his post office address, 5400 First International Bank Bldg., Dallas, Texas 75270.

All parties required to be served have been served.

DATED: December 9th, 1981

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Amicus Brief

1

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No. 81-903

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LAKEWOOD BANK AND TRUST COMPANY,

Petitioner,

v.

HAROLD C. ABRAMSON, TRUSTEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Until 1980, more than eight decades after the enactment of the Bankruptcy Act, no court had ever held that a foreclosure sale of real property under a deed of trust securing a mortgage loan constituted a fraudulent transfer revocable by a trustee in bankruptcy where the sale was made prior to the filing of the petition in bankruptcy. In reliance on this understanding of the law, purchasers at foreclosure sales, title insurers, and mortgage lenders have invested in, insured the titles to, and made mortgage loans on such real estate. The majority decision of the court below has unsettled this long-standing interpretation, and raises the following important question under the Bankruptcy Act: Does a foreclosure sale pursuant to a recorded deed of trust constitute a "transfer made . . . by a debtor" that can be set aside by a trustee in bankruptcy?

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Land Title Association hereby respectfully moves for leave to file the attached brief as amicus curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested, but has been denied.

The American Land Title Association is the national trade association of the land title industry. The Association has approximately 2,200 members, including

land title insurers, title insurance agents, abstracters, and associate members. The principal function of the land title industry is to facilitate the safe, certain, and efficient transfer of title to real estate in both residential and commercial transactions by ascertaining and insuring the rights of purchasers, mortgage lenders, and others in such real estate transactions.

The interest of the American Land Title Association in this case arises because of the interest of its members in the certainty and predictability of the laws affecting titles to and rights in real estate. The uncertainty in the law created by the decision below constitutes a significant problem for the members of the Association who must ascertain and insure the rights of purchasers, mortgage lenders, and others who have interests in real estate.

Respectfully submitted,

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TABLE OF CONTENTS

Page

QUESTION PRESENTED i

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* iii

OPINIONS BELOW 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE AND INTEREST OF THE AMICUS CURIAE 2

SUMMARY OF ARGUMENT 5

ARGUMENT:

I. This case presents an important question of federal law, potentially affecting tens of thousands of real estate transactions each year, that should be resolved by this Court 5

II. The decision below conflicts with section 67(d)(5) of the Bankruptcy Act 8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980) 4, 5

In re Madrid, Case No. 81-00038 (United States Bankruptcy Ct., D. Nev., May 1, 1981) *appeal pending*, United States Bankruptcy Appellate Panel of the Ninth Circuit, No. NV-81-1106-HVL 10

Other Authorities:

11 U.S.C. § 1(30) (1976), Section 1(30) of the Bankruptcy Act 10

11 U.S.C. § 101(40) (Supp. III 1979) 10

11 U.S.C. § 107(d) (1976), Section 67(d) of the Bankruptcy Act 10

Other Authorities, continued: *Page*

11 U.S.C. § 107(d)(2) (1976), Section 67(d)(2) of the Bankruptcy Act 2

11 U.S.C. § 107(d)(5) (1976), Section 67(d)(5) of the Bankruptcy Act 3, 9

11 U.S.C. § 548 (Supp. III 1979) 10

Pub. L. No. 95-598, Title IV, §§ 402(a), 403(a), 92 Stat. 2683 (1978) 10

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 647 F.2d 547. The order of the district court (Pet. App. B) is unreported.

STATUTES INVOLVED

The statutory provisions involved in the case are section 67(d)(2) and (d)(5) of the Bankruptcy Act of 1898, 11 U.S.C. § 107(d) (1976) (Pet. App. D), and section 1(30) of the Bankruptcy Act of 1898, 11 U.S.C. § 1(30) (1976) (Pet. App. E).

STATEMENT OF THE CASE AND INTEREST OF THE *AMICUS CURIAE*

On July 30, 1975, Frank L. and Nina P. Johnson executed and delivered to Lakewood Bank and Trust Company, petitioner herein, their promissory note in the principal amount of $74,000, secured by a deed of trust on 73 acres of land in Texas. This deed of trust was duly recorded under Texas law on August 5, 1975. After the Johnsons failed to make payments on their note, the note was declared in default and a nonjudicial foreclosure sale of the land securing the note was held on August 3, 1976. On February 24, 1977, some 18 months after the recording of the deed of trust and some six months after the foreclosure sale, the Johnsons filed a petition in bankruptcy. In March of 1978, the Johnsons' trustee in bankruptcy, respondent herein, brought suit in the United States District Court for the Northern District of Texas to set aside the foreclosure sale on the ground that the sale was a fraudulent transfer within the meaning of section 67(d)(2) of the Bankruptcy Act, 11 U.S.C. § 107(d)(2) (1976). Section 67(d)(2) provides in part that a "transfer made . . . by a debtor within one year prior to the filing of a petition" in bankruptcy without fair consideration being received by the debtor constitutes a fraudulent transfer that may be set aside by the trustee.

Section 67(d)(5) of the Bankruptcy Act, 11 U.S.C. § 107(d)(5) (1976), provides that for purposes of section 67(d) a transfer shall be deemed made when it becomes so far perfected "that no bona fide purchaser from the debtor could thereafter acquire any rights in the property so transferred superior to the rights of the transferee therein." The district court concluded, on the basis of this provision, that the "transfer" made by the Johnsons within the meaning of section 67(d)(2) occurred on August 5, 1975, more than one year prior to the filing of the bankruptcy petition, when the executed deed of trust in favor of the petitioner was recorded. The district court determined that under Texas law petitioner's rights in the property at issue became superior to the rights of any subsequent bona fide purchaser upon the recording of the deed of trust. Pet. App. B at B-3. Having held that the transfer to petitioner had been made as of August 5, 1975, the district court concluded that there was no case authority or any basis under section 67(d) to hold that the foreclosure sale constituted a second transfer by the debtors. Accordingly, the district court held that respondent had no cause of action under section 67(d)(2).

On appeal, the United States Court of Appeals for the Fifth Circuit, without ever discussing or citing section 67(d)(5), ruled that while a "transfer" by the debtors had been made on August 5, 1975, a second "transfer" within the meaning of section 67(d)(2) had occurred as a result of the foreclosure sale. Since the second "transfer" had occurred within one year prior to the filing of the bankruptcy petition, the court of appeals held that the foreclosure sale was voidable if fair consideration had not been received in the foreclosure sale and remanded the case for further proceedings to determine, *inter alia,* whether the foreclosure sale should

be set aside under section 67(d). In so holding, the court below followed its 1980 decision in *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980), which reached an identical holding. The court of appeals denied a petition for rehearing on August 14, 1981.

The holdings of the court of appeals in the decision below and in *Durrett* that a foreclosure sale held pursuant to a perfected deed of trust is itself a transfer within the meaning of section 67(d)(2) constitute an unprecedented and disquieting interpretation of the Bankruptcy Act. Not only is this view in conflict with what had been the universally accepted understanding of the law for more than eight decades, but until this Court conclusively determines the issue, the Fifth Circuit's decisions below and in *Durrett* create significant uncertainty regarding the proper interpretation of the Bankruptcy Act. This uncertainty poses a major problem for members of the American Land Title Association,[1] *amicus curiae* herein, and others who insure interests in real estate in determining the scope of title insurance protection that can be given to purchasers at foreclosure sales or to purchasers of real estate the titles to which emanate from foreclosure sales. As discussed below, to the extent that mortgage lenders and other purchasers at foreclosure sales cannot be assured that such sales will

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[1]The American Land Title Association (ALTA) is the national trade association of the land title industry. The Association has approximately 2,200 members, including land title insurers, title insurance agents, abstracters, and associate members. The principal function of the land title industry is to facilitate the safe, certain, and efficient transfer of title to real estate in both residential and commercial transactions by ascertaining and insuring the rights of purchasers, mortgage lenders, and others involved in real estate transactions.

not be set aside by the subsequent action of a trustee in bankruptcy, there will be increased uncertainties regarding titles to real properties that are sold at foreclosure sales, and consequently the risks and costs of mortgage lending will increase, to the ultimate detriment of the public.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be granted because (1) this case presents an important question of federal law that should be resolved by this Court as promptly as possible in order to avoid uncertainty in tens of thousands of real estate transactions each year and (2) the decision below conflicts with section 67(d)(5) of the Bankruptcy Act.

ARGUMENT

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW, POTENTIALLY AFFECTING TENS OF THOUSANDS OF REAL ESTATE TRANSACTIONS EACH YEAR, THAT SHOULD BE RESOLVED BY THIS COURT.

The decision below, together with the 1980 decision of the Fifth Circuit in *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980), relied on by the court below, represents an unprecedented interpretation of the meaning of section 67(d) that is at odds with the understanding of that section shared by mortgage lenders, title insurers, attorneys, bankruptcy courts and practitioners for over eight decades since the Bankruptcy Act's enactment in 1898. So far as can be determined, until the decision in *Durrett*, no court had ever cast doubt on the principle that a foreclosure sale

of a previously perfected deed of trust is not a transfer made by the debtor within the meaning of section 67(d). It appears to have been universally accepted prior to *Durrett* that, while the recording of an executed deed of trust constituted a "transfer" within the meaning of section 67(d), a subsequent foreclosure sale held pursuant to that deed of trust did not constitute a second transfer that could be set aside by a trustee in a bankruptcy if the sale took place prior to the filing of the bankruptcy petition. Judge Clark, dissenting from the majority decision below, recognized the sharp reversal of the prevailing interpretation of the Bankruptcy Act resulting from the Fifth Circuit's decisions when he stated: "[i]t is interesting to me that *Durrett* is the first case treating this problem—after 90 years of bankruptcy law and mortgages of a time greater than the memory of man. It again establishes what an imaginative lawyer can do when he adds persuasion." 647 F.2d at 550. Unfortunately, the imagination and persuasiveness of the lawyer in *Durrett* has created great uncertainty for title insurers called upon to insure the rights acquired by purchasers at foreclosure sales and may increase significantly the risks of mortgage lending (and therefore ultimately the costs of mortgage borrowing) by undermining the cornerstone of a mortgage lender's security—the right to foreclose on the mortgaged property in the event of a default.

Title insurers and attorneys who are called upon to provide title opinions are significantly affected by the uncertainty created by the Fifth Circuit because they are now unable to determine until long after a foreclosure sale takes place whether the title obtained by the purchaser at the foreclosure sale will be immune from challenge as a fraudulent transfer under the bankruptcy law. The Fifth Circuit's interpretation of the law—and

the concern that other circuits may adopt a similar interpretation—is likely to result in title insurers excepting from coverage under title insurance policies issued to purchasers at foreclosure sales or their mortgage lenders the possible claim by a trustee in bankruptcy that the foreclosure sale may be a fraudulent transfer. The additional risks that mortgage lenders and purchasers at foreclosure sales will therefore have to bear will result in several adverse consequences.

First, many potential purchasers at foreclosure sales may be reluctant to purchase such properties because of the risk that the sale may be set aside by a trustee in bankruptcy if a bankruptcy petition is filed by the debtor within a year after the sale. Indeed, because the trustee may not challenge the sale until many months after the bankruptcy petition is filed, the uncertainty faced by the purchaser exists for considerably longer than one year. Moreover, even if the purchaser at a foreclosure sale believes that he is paying fair consideration for the property, he may be subjecting himself to a lawsuit by a trustee in bankruptcy who does not share his view of the value of the property. Perversely, these additional risks faced by purchasers at foreclosure sales may result in fewer potential purchasers willing to bid at foreclosure sales and in lower bids than would be the case in the absence of these risks. Such a development would obviously be to the detriment of both mortgage lenders and debtors. Thus, the interpretation of the Bankruptcy Act adopted by the court below is not only novel but, by tending to depress the amounts received for properties sold at foreclosure sales, may also thwart the underlying policy of the Bankruptcy Act to protect debtors.

Second, mortgage lenders, who frequently are the only purchasers at such foreclosure sales, will face a difficult problem. If the mortgage lender or his agent purchases the property at the foreclosure sale, he may be unable to resell the property for a year—or for an indefinite period if, during the year, the debtor goes into bankruptcy—a result that is at odds with the public policy favoring the free alienability of land. Moreover, in addition to the losses he will incur in having his funds tied up for the holding period, the lender will be forced to incur expenses in maintaining the property.

In sum, the essential right a mortgage lender relies upon for the security of his loan—the right to foreclose on the property in the event of default—has been seriously eroded by the interpretation adopted by the Fifth Circuit. As a consequence, the additional risks and costs incurred by mortgage lenders inevitably will be reflected in the reduced availability of mortgage funds or in an increase in mortgage interest rates, to the detriment of all potential sellers or purchasers of real estate.[2]

II.

THE DECISION BELOW CONFLICTS WITH SECTION 67(d)(5) OF THE BANKRUPTCY ACT.

This Court should also review the decision below because the decision conflicts with the language of

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[2]The problem presented for title insurers, mortgage lenders, and others by the decision below will not be mitigated by further proceedings in this case on remand. Regardless of whether the particular foreclosure sale in this case can survive scrutiny under section 67(d) of the Bankruptcy Act, if the decision below is allowed to stand every foreclosure sale will be subject to the risk of being set aside by a trustee in bankruptcy.

section 67(d)(5) of the Bankruptcy Act. Section 67(d)(5) provides:

> For the purposes of this subdivision d, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein ....

This provision is controlling and dictates that a foreclosure sale is not a transfer by the debtor within the meaning of section 67(d). The recording of the deed of trust, which provides that the trustee holds title to the property with instructions to foreclose and sell the property in the event of default by the debtor, is the event by which the power to transfer the property pursuant to a foreclosure sale becomes "so far perfected" that a "transfer" within the meaning of section 67(d) has taken place. Consequently, the exercise of the right to sell property by foreclosure sale acquired by the lender pursuant to the deed of trust cannot be a transfer for purposes of section 67(d).[3] The district court placed primary reliance on section 67(d)(5) in ruling that the

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[3]Under section 67(d) a foreclosure sale under a deed of trust should not be deemed to constitute a transfer by the debtor irrespective of whether the deed of trust was recorded within or without the one year period prior to the filing of the petition in bankruptcy. If the deed of trust was recorded more than one year prior to the filing of the bankruptcy petition, that transfer can never be held to be a fraudulent transfer within the meaning of section 67(d) because it is outside the statutory one year period. If the deed of trust was recorded within one year prior to the filing of the bankruptcy petition, the transfer that took place when the deed of trust was recorded is subject to the provisions of section 67(d), but even in that case the subsequent foreclosure under the deed of trust would not constitute a second transfer subject to the provisions of section 67(d).

foreclosure sale was not a transfer within the meaning of section 67(d). Inexplicably, neither in *Durrett* nor in the case below did the Fifth Circuit discuss or refer to section 67(d)(5) in arriving at the opposite conclusion.

Although the case below was decided under the old bankruptcy law, which has been supplanted for bankruptcies commencing after October 1, 1979, by the new codification of the bankruptcy law, Pub. L. No. 95-598, title IV, §§ 402(a), 403(a), 92 Stat. 2683 (1978), the Court nevertheless should grant a writ of certiorari in this case rather than delaying until the issue is presented in a case involving the new bankruptcy law. Although the relevant statutory provisions have been modified under the new law, the modifications are not material for purposes of the issue presented, which is identical under both the old and the new laws. *Compare* 11 U.S.C. § 548 (Supp. III 1979) (new law) *with* section 67(d), 11 U.S.C. § 107(d) (1976) (old law) *and* 11 U.S.C. § 101(40) (Supp. III 1979) (new law) *with* section 1(30), 11 U.S.C. § 1(30) (1976) (old law). Furthermore, at least one court that has considered the issue under the new law has determined the *Durrett* holding to be controlling precedent on the proper construction of the new law. *See In re Madrid,* Case No. 81-00038 at 9-10 (United States Bankruptcy Ct., D. Nev., May 1, 1981), *appeal pending,* United States Bankruptcy Panel of the Ninth Circuit, No. NV-81-1106-HVL.

The uncertainties and problems presented by the decision below are especially troublesome since the current economic situation is producing a substantial increase in both foreclosure sales and in bankruptcies. It is both undesirable and unnecessary to allow these uncertainties and problems to jeopardize the many thousands of real estate transactions that will take place

during the several years necessary for a case raising this issue under the new bankruptcy law to reach this Court.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Amicus Brief

2

MOTION FILED
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No. 81 - 903

IN THE
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OCTOBER TERM, 1981

LAKEWOOD BANK AND TRUST COMPANY,
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Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE FEDERAL LAND BANK OF TEXAS, FEDERAL INTERMEDIATE CREDIT BANK OF TEXAS, TEXAS BANK FOR COOPERATIVES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 10, 1981

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Motion for Leave to File Brief as *Amicus Curiae* 1

Interest of *Amicus Curiae* 4

Argument 7

Conclusion 12

Appendix

Durrett v. Washington National Insurance Company 621 F2d 201 (5th Cir. 1980). ..... app. A

§67(d) of the Bankruptcy Act entitled "Liens and Fraudulent Transfers" 11 U.S.C. 107 ... app. B

Vernon's Texas Civil Statutes, Effect of Recording, Art. 6627, "When sales, etc., to be void unless registered ..... app. C

Vernon's Texas Civil Statutes, Effect of Recording, Art. 6631, "Deed, etc., valid against subsequent credits. ..... app. D

TABLE OF AUTHORITIES

Cases: Page

Durrett v. Washington National Insurance Company, 621 F.2d (5th Cir. 1980) 5, 8, 10, 11

In re Judith Lynn Madrid v. Del Mar Commerce Co., 10 B. R. 795 (D. Nev. 1981) 6, 10

Carroll v. Holliman, 336 F.2d 425 (10th Cir. 1964), *cert. denied*, 380 U. S. 907 (1965) 9

Statutes:

12 U.S.C. §2001 Farm Credit Act of 1971, as amended 4, 10

11 U.S.C. §107, §67d (1)(e)(1) repealed Bankruptcy Act ..... 5, app. B

11 U.S.C. §107, §67d (5) repealed Bankruptcy Act ..... 6, 8, 9, 10, app. B

12 U.S.C. §2001 (a) Farm Credit Act of 1971, as amended 6

11 U.S.C. §548 Bankruptcy Code of 1978 6

11 U.S.C. §110, §70 repealed Bankruptcy Act ... 8, 9

Vernon's Texas Civil Statutes, Article 6627 ..... 9, app. C

Vernon's Texas Civil Statutes, Article 6631 ..... 9, app. D

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Federal Land Bank of Texas, the Federal Intermediate Credit Bank of Texas, and the Texas Bank for Cooperatives hereby respectfully move for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondent was requested but refused.

The interest of the Banks named above arises from the fact that the opinion and holding of the Fifth Circuit Court of Appeals directly affects the ability of these Banks to effectively carry on their cooperative purposes under both their generic federal statutes, 12 U.S.C. 2001, *et seq.*, and applicable Texas statutes.

In this case, the Fifth Circuit Court of Appeals has ruled, as a matter of law, that if a secured creditor exercises his rights

of non-judicial foreclosure pursuant to appropriate state statutes, and the debtor files a petition for relief under the repealed Bankruptcy Act (11 U.S.C. 101) within one year of that time, then, unless the creditor or successful bidder paid at least 70 percent of the current market value for the property, the Trustee or debtor in possession could bring a proceeding to set aside the foreclosure sale as a fraudulent transfer under Section 67(d) of the repealed Bankruptcy Act (11 U.S.C. 107). Even though the facts in *Abramson* relate to the non-judicial foreclosure of real property pursuant to a Texas deed of trust, the statutes interpreted involve a "transfer" "of property" and do not differentiate either between judicial or non-judicial transfers. Neither do they distinguish between real or personal property. Because the principle of fraudulent transfers is carried forward into Section 548 of the new Bankruptcy Code (11 U.S.C. 548), we feel that the decision in *Abramson* will be controlling on future cases. Present evidence of this can be seen in the case of *In re Judith Lynn Madrid* v. *Del Mar Commerce Company*, 10 B.R. 795, 800, where the United States Bankruptcy Court, Nevada District, decided a case filed under the new Bankruptcy Code and cited *Durrett* v. *Washington National Insurance Company*, 621 F2d 201 (5th Cir. 1980), as authoritative of that fact; "It is apparent that the Courts have established a firm 70% guideline because the greater the market value of a piece of property, the more equity that can be cut off by the variation of a few percentage points."

In the Court of Appeals, Petitioner argued primarily as to the definition of fraudulent transfer found in §67d of the Bankruptcy Act and did not adequately mention §70c of that Act or the importance of state laws. Furthermore, Petitioner did not adequately mention the impact and effect this ruling has on all secured lenders. Since it is likely that Petitioner may pursue the same course in this Court, it is believed that the brief which *amicus curiae* is requesting permission to file will contain a more complete argument on this issue. If this argument is accepted, it will be dispositive of this case.

Respectfully submitted,

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Of Counsel:

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William E. Zimmerman

December 10, 1981

No. 81 - 903

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LAKEWOOD BANK AND TRUST COMPANY,

Petitioner,

v.

HAROLD C. ABRAMSON, TRUSTEE,

Respondent.

The Federal Land Bank of Texas, the Federal Intermediate Credit Bank of Texas, and the Texas Bank for Cooperatives submit this brief as *amicus curiae*, under Motion for Leave to File Brief *Amicus Curiae* pursuant to Rule 36.1, supporting the petition for certiorari.

INTEREST OF *AMICUS CURIAE*

Under the Farm Credit Act of 1971, as amended, 12 U.S.C. 2001, *et seq.*, "It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations." This policy is established and carried forward through the cooperatively owned Farm Credit System.

This System is divided into 12 Farm Credit Districts, and includes 12 Federal Land Banks, 487 Federal Land Bank Associations, 12 Federal Intermediate Credit Banks, 423 Production Credit Associations, and 13 Banks for Cooperatives throughout the United States. Although representing only the Tenth Farm Credit District, hereinafter referred to as the Farm Credit Banks of Texas,[1] it is the opinion of the *amicus* that the views stated herein would apply to all the remaining 11 Farm Credit Districts. The ruling in the case at bar is of far-reaching importance because the Farm Credit Banks of Texas have loans outstanding of approximately $3,825,000,000 to some 53,000 borrowers in the Texas agricultural community.

The opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding June 10, 1981, frustrates the above stated intent of Congress.

In the case at bar, the Court of Appeals followed its 1980 decision in the case of *Durrett* v. *Washington National Insurance Company*, 621 F.2d 201, (5th Cir. 1980 opinion attached as Appendix "A"), wherein it ruled for the first time that the terms "fair equivalent" and "fair consideration" as used in Section 67d(1)(e)(1) of the Bankruptcy Act (11 U.S.C. §107), quoted in Appendix "B", now mean at least 70 percent of the fair market value of the property to be sold determined as of the date of foreclosure sale. We have found no case wherein any other Court has established such a rule as a matter of law against which to measure the "fair consideration" or "fair equivalent" value of property of the debtor. While we think that state law should be used to determine whether or not the debtor received fair consideration

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[1]The Farm Credit Banks of Texas is comprised of The Federal Land Bank of Texas, the Federal Intermediate Credit Bank of Texas and the Texas Bank for Cooperatives.

for the security, we do not think a judicially legislated percentage should be established by the Fifth Circuit Court of Appeals. Furthermore, we do not think the Bankruptcy Courts should in effect either create a three-year period of redemption in those states where none is otherwise provided or extend the period of redemption in those states where state law dictates otherwise. If the debtor files a petition for relief in the Bankruptcy Court within one year of the transfer, the Trustee or debtor in possession has two more years to file a complaint to set aside the transfer as a fraudulent conveyance.

By holding that a non-judicial foreclosure sale pursuant to the power of sale under a deed of trust given to secure a loan constitutes a "transfer" within the meaning of Section 67d(5) of the Bankruptcy Act (11 U.S.C. §107), quoted in Appendix "B", the Fifth Circuit has added a great deal of uncertainty, confusion, and unnecessary costs to those intended beneficiaries of the Farm Credit Act of 1971, the farmers and ranchers of America (12 U.S.C. 2001 (a). Although this decision is under the repealed Bankruptcy Act, because the principle of fraudulent transfers is carried forward into Section 548 of the new Bankruptcy Code (11 U.S.C. 548), we feel that the decision in this case will be precedent to future cases. As an example, the United States Bankruptcy Court, Nevada District, decided a case filed after October 1, 1979, the effective date for the Bankruptcy Code, and relied on *Durrett* as precedent for its decision. In that case, *In re Judith Lynn Madrid* v. *Del Mar Commerce Co.*, 10 B. R. 795 (1981), the Nevada District Court followed the 70 percent rule first set forth in *Durrett* and set aside a foreclosure sale where 64 percent to 67 percent of the market value of the property had been received at the foreclosure sale.

For reasons stated in the petition, this *amicus* believes the decision of the Fifth Circuit is erroneous. Its ruling directly affects numerous decisions of importance that could impact

the nation's business economy, established state laws pertaining to secured transactions, and established lending practices. This *amicus* believes the ruling of the Fifth Circuit presents a classic occasion for authoritative resolution by this Court.

ARGUMENT – The Decision in the Fifth Circuit Court of Appeals Presents an Important Precedent to Future Decisions and May Have a Profound Impact on This Nation's Economy Calling for Authoritative Guidance by This Court.

It is the position of the *amicus* that the majority erred when it held: "Accordingly, the foreclosure sale of the Johnsons' 73 acres was also a transfer within the meaning of the Act" (647 F.2d 547, 549). We agree with the holding of the trial court, 460 F. Supp. 52, and the Statement by Judge Clark in his dissent, 647 F. 2d 547, 549, wherein Judge Clark said:

> A foreclosure sale by a mortgagee or trustee is not a transfer *by* the debtor, although done in his name pursuant to a power of sale in the mortgage or deed of trust. The debtor's act, which triggers foreclosure, is the failure to fulfill some obligation in the promissory note, which is secured by the mortgage or deed of trust. The creditor then declares the obligation due, forecloses and sells at a public sale to the highest bidder. The mortgagor-trustor/bankrupt does nothing but default -- that cannot be translated into a "transfer." It is not a voluntary conveyance on his part. The power of sale vested in the mortgagee or trustee, when coupled with an interest as here, is a valuable property right acquired by that party at the time of the execution of the initial mortgage

> or trust deed.[1] When that time is more than 12 months before the filing of the bankruptcy petition, the power of sale is vested absolutely in the mortgagee or trustee.

647 F. 2d 547, 549.

The Circuit Court in both *Durrett* and *Abramson* has established a theory of partial or phased transfers, which could be never-ending. By holding that the voluntary granting of a lien on property is only part of the transfer contemplated by the Bankruptcy Act, and that the foreclosure sale itself is the final transfer contemplated in Section 67d, the Circuit Court is recognizing a multistage transfer for purposes of the Bankruptcy Act. It is the *amicus'* position that the granting and recording of the lien is the proper and only transfer contemplated by the Bankruptcy Act. State law should control when addressing the definition of "transfer." Texas statutes provide that a deed of trust shall take effect when properly recorded and will thereafter be valid as to all subsequent purchasers, including judgment lien creditors.

Section 70 of the former Bankruptcy Act provided in part(c):

> . . .The trustee shall have, as of the date of the bankruptcy, rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such creditor exists, (2) a creditor, who, upon the date of bankruptcy, obtained an execution returned unsatisfied against the bankrupt, whether or not such creditor exists, and (3) a creditor, who, upon the date of the

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[1]Technically, a mortgage does not contain a power of sale, while a deed of trust to secure debt does contain such a power. However, in common parlance the generic term "mortgage" embraces all forms of instruments creating a lien on realty for the purpose of securing a debt. Many contain powers of sale in order to avoid court proceedings which are necessary in strict mortgage states. *(footnote to Dissenting Opinion)*

> bankruptcy, obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt, upon a simple contract, could have obtained such a lien, whether or not such a creditor exists. . .

11 U.S.C. §110.

The Trustee's status, under this section, is as a "hypothetical judgment lien creditor," and the Act confers on the Trustee rights no greater than those accorded such a creditor by applicable state law. In *Carroll* v. *Holliman* 336 F.2d 425 (10 Cir. 1964) *cert. denied* 380 U.S. 907 (1965), the United States Court of Appeals, Tenth Circuit, referring to Section 70(c) of the Bankruptcy Act stated ". . .the trustee is given the status of an ideal lien creditor whose priority is determined by the substantive law of the state in which the property is situated. . ." 336 F.2d 429. It is clear that the Congressional intent was to place the Trustee in a position to avoid an improper or invalid transfer. As stated in Article 6627 of Vernon's Texas Civil Statutes, quoted in Appendix "D", ". . .all deeds of trust and mortgages shall be void as to all creditors and subsequent purchases for a valuable consideration, without notice, unless they shall be acknowledged or approved and filed with the clerk, to be recorded as required by law;. . ." Furthermore, in accordance with Article 6631 of Vernon's Texas Civil Statutes, quoted in Appendix "E", ". . .a deed of trust or mortgage. . .shall take effect and be valid as to all subsequent purchases for a valuable consideration without notice, and as to all creditors from the time such instrument shall have been so acknowledged, proved or certified and delivered to such clerk to be recorded, and from that time only. . ." Because a recorded deed of trust is valid as against a bona fide purchaser for value without notice, the transfer mentioned in Section 67d(5) is final.

> For the purposes of this subdivision d, a transfer shall be deemed to have been made at the time when it becomes so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but, if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this act, it shall be deemed to have been made immediately before the filing of such petition.

11 U.S.C. §107.

While the Courts in *Abramson*, *Durrett*, and *Madrid* addressed their rulings to the non-judicial foreclosure of real property, the statutes interpreted related to the transfer of property. No distinction is made between judicial and non-judicial transfers, or real or personal property. Consequently, these decisions will be controlling on the actions of all secured lenders. If this Honorable Court allows the Fifth Circuit's opinion in *Abramson* to stand as written, thereby effectively affirming *Durrett*, this ruling will cause all secured creditors to fear that any activity by either themselves, the debtor/owner, or a subsequent conditional purchaser will later be held a fraudulent transfer against the debtor in possession or Trustee. This fear will most probably be translated into economic terms and passed either directly or indirectly to the borrower. This is not consistent with the Farm Credit Act's stated purpose.

Assuming *arguendo* that the secured lender seeks to avail himself of state non-judicial or judicial foreclosure remedies, he then finds himself faced with the extra expense of hiring qualified outside professionals to appraise the property as of the day of the foreclosure sale. The lender may then purchase the property at the foreclosure sale for at least 70 percent of its current fair market value requiring the lender to give the amount paid above its debt to either the debtor (which would

be an inequitable windfall to the defaulting debtor), or other subordinate lienholders of the property. This may result in the secured lender being required to pay out of its own funds not only more than the indebtedness against the property but also more than it ever would be required to pay to purchase that property at a bona fide public sale. Another alternative for a secured lender is to purchase the property at foreclosure sale for the value of its debt and hold the property for at least one additional year, thereby adding interest and expenses to its unrecoverable costs. After this one-year period, the purchaser should know whether or not it would be able to sell the land to a bona fide purchaser for value without fear of an action being brought against it by a debtor in possession or Trustee under the precedent set forth in *Durrett* and *Abramson*. Because of the uncertainties and costs mentioned above, we feel it only essential that these added costs and expenses will be passed on to borrowers either resulting in a lower percentage loan or a higher interest rate. Furthermore, in the farmer-owned cooperative Farm Credit System, this precedent could also result in a possible decrease in the member/owner's patronage refunds or dividends.

CONCLUSION

The writ of certiorari should be granted because the rule relating to "transfer" as espoused in *Durrett* and *Abramson* will have widespread effects and severe consequences on all secured transactions.

Respectfully submitted,

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William E. Zimmerman

HAROLD C. ABRAMSON, Trustee,
Plaintiff-Appellant,

v.

LAKEWOOD BANK AND TRUST COMPANY,
Defendant-Appellee.

No. 79-1592.

United States Court of Appeals,
Fifth Circuit.

June 10, 1981

Trustee in bankruptcy brought suit to have foreclosure sale declared a fraudulent transfer under Bankruptcy Act. The United States District Court for the Northern District of Texas, at Dallas, Robert W. Porter, J., granted summary judgment for bank and refused to set aside alleged transfer, and trustee appealed. The Court of Appeals held that bank's nonjudicial foreclosure sale was a "transfer" within meaning of Bankruptcy Act, and as transfer occurred within one-year period prior to date of filing of bankruptcy petition, it was subject to being set aside as fraudulent if it was made without fair consideration.

Reversed and remanded.

Thomas A. Clark, Circuit Judge, dissented and filed opinion.

Bankruptcy — 165 (3.2)

Bank's nonjudicial foreclosure sale was a "transfer" within meaning of Bankruptcy Act, and as transfer occurred within

one-year period prior to date of filing of bankruptcy petition, it was subject to being set aside as fraudulent if it was made without fair consideration. Bankr.Act, §§ 1(30), 67(d)(2), 11 U.S.C.A. §§ 1(30), 107(d)(2).

See publication Words and Phrases for other judicial constructions and definitions.

Philip L. Palmer, Jr., Dallas, Tex., for plaintiff-appellant.

Storey, Armstrong, Steger & Martin, William L. Bedard, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GODBOLD, Chief Judge, SIMPSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

This is an appeal by Harold C. Abramson, acting as trustee in bankruptcy under Chapter XI of the old Bankruptcy Act,[1]

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[1]The foreclosure sale of the property under attack here occurred August 3, 1976. Appellant filed a petition under Chapter XI of the Bankruptcy Act on February 24, 1977. Sec. 403(a) of Pub.L. No. 95-598, Title I (Nov. 6, 1978), 92 Stat. 2549 provides as follows:

> A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act [Pub.L. 95-598] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

Since the events giving rise to this lawsuit occurred before the effective date of the new Bankruptcy Act the rights of the parties herein are governed by "repealed Title XI." When reference is made in this opinion to the "Act" or the "Bankruptcy Act" this same shall refer to "repealed Title XI."

former 11 U.S.C. § 1, *et seq.*, of the district court's order refusing to set aside an alleged transfer of real property within one year of the filing of debtor's bankruptcy petition. The district court granted summary judgment for the defendant-appellee, Lakewood Bank and Trust Company ("Lakewood Bank"), holding that the non-judicial foreclosure sale of the debtor's land did not constitute a "transfer" within the meaning of § 67(d) of the Bankruptcy Act. We reverse.

The facts can be stated briefly. The appellant, Abramson, brought this action in his capacity as court appointed trustee in the bankruptcy of Frank L. Johnson and Nina P. Johnson. The appellee, Lakewood Bank, is a Dallas bank. The bankrupts owned seventy-three acres of land in Kaufman County, Texas. In August of 1975, the bankrupts borrowed $74,000 on an installment loan. This loan was secured by a conventional deed of trust in favor of the bank on the seventy-three acres.

The deed of trust was recorded by the bank on August 5, 1975. When the bankrupts were unable to fulfill their financial obligations to the Lakewood Bank, a foreclosure sale was held on August 3, 1976, at which time the Lakewood Bank, through its agent Louis McClain, purchased the property for $65,000 cash. At the time of the foreclosure sale, the bankrupts owed approximately $71,000 on the mortgage. On February 24, 1977, the Johnsons filed a petition to be adjudicated bankrupt in the United States Bankruptcy Court for the Northern District of Texas.

The Trustee brought this action in March, 1978, to have the August, 1976, foreclosure sale declared a fraudulent transfer under § 67(d) of the Bankruptcy Act. While the deed of trust had been executed more than one year prior to the date of the filing of the bankruptcy petition, the actual

foreclosure sale occurred less than seven months before the filing. Section 67(d)(2) provided that "[e]very *transfer* made and every obligation incurred by a debtor within one year prior to the filing" of the bankruptcy petition "is fraudulent . . . as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent." 11 U.S.C. § 107(d)(2) (1966) (current version at 11 U.S.C. § 548(a) (1978)) (emphasis supplied).

In granting summary judgment for the Lakewood Bank, the district court held that for purposes of the Bankruptcy Act, there was only one "transfer" in this case and that it "occurred at the latest on August 5, 1975, more than 18 months prior to the adjudication of bankruptcy."

More than a year after the issuance of the district court's ruling in the *Abramson* case, this court of appeals decided the remarkably similar case of *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980). As to the narrow issue before us on this appeal, i. e., whether the bank's non-judicial foreclosure sale constituted a "transfer" within the meaning of the Act, we consider the holding in *Durrett* as controlling.

The word "transfer" was defined in Section 1 of the Act as including:

> the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage,

> lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.

11 U.S.C. § 1(30).[2]

In *Durrett*, this court held that a Texas non-judicial foreclosure sale constituted a transfer within the meaning of § 67(d). There, a deed of trust to secure debt had been executed in 1969. In January, 1977, some nine days prior to the debtor's filing for bankruptcy, the trustee in the deed of trust sold the property at a non-judicial foreclosure sale as authorized by the deed of trust and Texas law. The debtor in possession under Chapter XI of the Bankruptcy Act brought suit to set aside the sale of the property as a voidable transfer.

In considering whether the foreclosure sale was a "transfer" made by the debtor in possession, a panel of this court set forth the definition of "transfer" and wrote:

> The comprehensive character of this definition leads us to conclude that the transfer of title to the real property of the debtor in possession pursuant to an arrangement under Chapter XI of the Act, by a trustee on foreclosure of a deed of trust, to a purchaser at the sale constitutes a "transfer" by debtor in possession within the purview of section 67(d). The actual transfer of title was made by Durrett to Fields, as trustee, via the deed of trust, executed April 7, 1969, to secure an indebtedness then owing to Southern and thereafter assigned to Washington. Possession of the property was retained by Durrett subject to the power of the trustee to sell

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[2]The current version of the definition of transfer is located at 11 U.S.C. § 101(40):

"transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest.

> and deliver possession of the property, on default, at a foreclosure sale. While the actual conveyance of title by Durrett was made on April 7, 1969, possession was retained until foreclosure of the deed of trust. The "transfer" within the contemplation of the Act, was not final until the day of the foreclosure sale, January 4, 1977. This was accomplished within the one-year period provided by section 67(d)(2), 11 U.S.C. § 107(d)(2).

Durrett v. Washington National Insurance Co., 621 F.2d at 204.

Accordingly, the foreclosure sale of the Johnsons' seventy-three acres was also a transfer within the meaning of the Act. As this transfer occurred within the one-year period, it is subject to being set aside as fraudulent if it was made without fair consideration. Therefore we reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

THOMAS A. CLARK, Circuit Judge, dissenting:

I dissent. Although I recognize our panel is bound by *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980), *Durrett* is simply wrong in its holding that a foreclosure sale is a transfer within the meaning of § 67(d). Subparagraph (2) of that section of the former Bankruptcy Act reads in part as follows:

> Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent . . . if made or incurred without fair consideration by a debtor . . . without regard to his actual intent; . . .

11 U.S.C. § 107(d)(2).

A foreclosure sale by a mortgagee or trustee is not a transfer *by* the debtor, although done in his name pursuant to a

power of sale in the mortgage or deed of trust. The debtor's act which triggers foreclosure is the failure to fulfill some obligation in the promissory note which is secured by the mortgage or deed of trust. The creditor than declares the obligation due, forecloses, and sells at a public sale to the highest bidder. The mortgagor-trustor/bankrupt does nothing but default — that cannot be translated into a "transfer." It is not a voluntary conveyance on his part. The power of sale vested in the mortgagee or trustee, when coupled with an interest as here, is a valuable property right acquired by that party at the time of the execution of the initial mortgage or trust deed.[1] When that time is more than twelve months before the filing of the bankruptcy petition, the power of sale is vested absolutely in the mortgagee or trustee.

It is basic mortgage law that at the time of the foreclosure sale the purchaser (who may or may not be the mortgagee or trustee) takes the same title to the property which the mortgagor or trustor had at the time of the initial mortgage or trust deed, subject only to property taxes (and perhaps some statutory intervening limitations as changes in zoning, etc., and the right of redemption by the mortgagee with a specified number of days granted statutorily in some states), and free and clear of any intervening liens or mortgages placed against the property by the debtor or any judgment creditor.

By our decision here and in *Durrett* we cast a cloud upon mortgages and trust deeds. Foreclosure within twelve months

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[1]Technically a mortgage does not contain a power of sale, while a deed of trust or deed to secure debt does contain such a power. However, in common parlance the generic term "mortgage" embraces all forms of instruments creating a lien on realty for the purpose of securing a debt. Many contain powers of sale in order to avoid court proceedings which are necessary in strict mortgage states.

before a filing creates a sale voidable by a trustee in bankruptcy if the public sale did not bring a "fair consideration." It is generally known that such sales do not bring the best price, but most states, including Texas, mandate public sales when foreclosure is the creditor's remedy. Many states, but not Texas, prohibit a deficiency judgment against the debtor unless the mortgagee obtains confirmation of the sale through a court proceeding where the fairness of the consideration is adjudicated.[2] Thus in those states a mortgagee who did not obtain judicial confirmation would be prohibited from filing a claim in the bankruptcy proceeding for the amount of the deficiency.

The cloud created over mortgages and trust deeds by making foreclosure sales subject to being voided by a bankruptcy trustee will naturally inhibit a purchaser other than the mortgagee from buying at foreclosure. This tends to depress further the prices of foreclosure sales and thus increase the potential size of the deficiency in each foreclosure in all six states comprising this circuit.

It is interesting to me that *Durrett* is the first case treating this problem — after 90 years of bankruptcy law and mortgages of a time greater than the memory of man. It again establishes what an imaginative lawyer can do when he adds persuasion.

I would affirm.

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2. *See, e. g., Ga.Code Ann.* § *67-1503* (confirmation of foreclosure sales under powers).

SECTION SIXTY-SEVEN (11 U.S.C. § 107)

§ 67. Liens and Fraudulent Transfers.

d. (1) For the purposes of, and exclusively applicable to, this subdivision d: (a) "Property" of a debtor shall include only his nonexempt property; (b) "debt" is any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent; (c) "creditor" is a person in whose favor a debt exists; (d) a person is "insolvent" when the present fair salable value of his property is less than the amount required to pay his debts; and to determine whether a partnership is insolvent, there shall be added to the partnership property, the present fair salable value of the separate property of each general partner in excess of the amount required to pay his separate debts, and also the amount realizable on any unpaid subscription to the partnership of each limited partner; and (e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained.

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered

insolvent, without regard to his actual intent; or (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; or (c) as to then existing and future creditors, if made or incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature; or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.

(3) Every transfer made and every obligation incurred by a debtor who is or will thereby be rendered insolvent, within four months prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent, as to then existing and future creditors: (a) if made or incurred in contemplation of the filing of a petition initiating a proceeding under this Act by or against the debtor or in contemplation of liquidation of all or the greater portion of the debtor's property, with intent to use the consideration obtained for such transfer or obligation to enable any creditor of such debtor to obtain a greater percentage of his debt than some other creditor of the same class, and (b) if the transferee or obligee of such transfer or obligation, at the time of such transfer or obligation, knew or believed that the debtor intended to make such use of such consideration. The remedies of the trustee for the avoidance of such transfer or obligation and of any ensuing preference shall be cumulative: *Provided, however,* That the trustee shall be entitled to only one satisfaction with respect thereto.

(4) Every transfer of partnership property and every partnership obligation incurred within one year prior to the filing of a petition initiating a proceeding under this Act by or against the partnership, when the partnership is insolvent or will be thereby rendered insolvent, is fraudulent as to partnership creditors existing at the time of such transfer or obligation, without regard to actual intent if made or incurred (a) to a partner, whether with or without a promise by him to pay partnership debts, or (b) to a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

(5) For the purposes of this subdivision d, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but, if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of such petition.

(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this Act, which is fraudulent under this subdivision d against creditors of such debtor having claims provable under this Act, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value: *Provided, however,* That the court may, on due notice, order such transfer or obligation to be preserved for the benefit of the estate and, in such event, the trustee shall succeed to and may enforce the rights of such transferee or obligee: *And provided further,* That such purchaser, lienor, or obligee, who without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision d, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment.

VERNON'S TEXAS CIVIL STATUTES

EFFECT OF RECORDING

Art. 6627. [6824] [4640] [4332] When sales, etc., to be void unless registered

All bargains, sales and other conveyances whatever, of any land, tenements and hereditaments, whether they may be made for passing any estate of freehold of inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing; and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk, to be recorded as required by law; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall be valid and binding; provided, however, that the rights, duties, obligations, and priorities of debtors, secured parties and their heirs, successors, and assigns, and the rights and priorities of creditors and subsequent purchasers with respect to the goods or other collateral described in the financing statements or security agreements filed as financing statements or continuation statements filed for record pursuant to the Business & Commerce Code, shall be governed by that code. Amended by Acts 1975, 64th Leg., p. 944, ch. 353, § 14, eff. June 19, 1975.

VERNON'S TEXAS CIVIL STATUTES

EFFECT OF RECORDING

Art. 6631. [6828] [4612] [4334] Deed, etc., valid against subsequent creditors

Every conveyance, covenant, agreement, deed, deed of trust or mortgage or certified copies of any such original conveyance, covenant, agreement, deed, deed of trust or mortgage copied from the deed or mortgage records of any county in the State where the same has been regularly recorded, although the land may not have been situated in the county where such instrument was recorded, and which shall have been acknowledged, proved or certified according to law, may be recorded in the county where the land lies; and when delivered to the clerk of the proper court to be recorded shall take effect and be valid as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors from the time when such instrument shall have been so acknowledged, proved or certified and delivered to such clerk to be recorded, and from that time only. All certified copies filed and recorded under the provisions of this article shall take effect and be in force from the time such certified copy was filed for record. Nothing herein shall be construed to validate an invalid instrument.

Acts 1895, p. 157; P.D. 4994; G.L. vol. 10, p. 887.

Amicus Brief

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No. 81-903

In The

Supreme Court of the United States

October Term, 1981

LAKEWOOD BANK AND TRUST COMPANY,
Petitioner,

v.

HAROLD C. ABRAMSON, Trustee,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FEDERAL NATIONAL MORTGAGE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 10, 1981

No. 81-903

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1981

LAKEWOOD BANK AND TRUST COMPANY,
Petitioner,

v.

HAROLD C. ABRAMSON, TRUSTEE,
Respondent.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FNMA") respectfully moves this court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorney for the petitioner herein has been obtained, but the attorney for the respondent herein refused to consent to the filing of a brief by FNMA as amicus curiae.

The applicant has an interest in this case, as do all the nation's lenders, for the reason that the decision of the United States Court of Appeals for the Fifth Circuit in this case undermines the security of the billions of dollars of loans in existence today nationwide. Specifically, the decision in *Lakewood v. Abramson* now effectively renders

all actions taken by creditors to enforce valid, perfected and pre-existing liens that occur within one year of the filing of a bankruptcy petition subject to possible attack for as long as three years after the enforcement action. The resulting confusion regarding the ability of creditors to recoup and mitigate their losses resulting from defaults by borrowers will potentially cripple the nation's lenders and further depress an already stagnate housing market.

The petition for writ of certiorari filed by the petitioner herein is inadequate in that it fails to address the existing conflict between the Fifth Circuit Court of Appeals and the Fourth Circuit Court of Appeals regarding the applicability of Section 67d(5) of the Bankruptcy Act, and Applicant has no reason to believe that the argument on this point will be expanded and made complete in this Court. If Applicant's argument is approved by this Court, a writ of certiorari should issue to review the opinion and decision of the Fifth Circuit.

Respectfully submitted,

WILLIAM D. SIMS

JENKENS & GILCHRIST
2200 First National Bank Bldg.
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(214) 653-4500
Counsel for Federal National Mortgage Association, Amicus Curiae

CERTIFICATE OF SERVICE

The undersigned, counsel for Federal National Mortgage Association, a member of the Bar of the Supreme Court of the United States, certifies that counsel for Petitioner, William L. Bedard, and counsel for Respondent, Philip I. Palmer, Jr., have been served with three copies of the foregoing Motion for Leave to File Amicus Curiae Brief, by depositing the documents in a United States Post Office or mailbox, with first class postage prepaid, addressed to said counsel for Petitioner at his post office address of 5400 First International Building, Dallas, Texas 75270, and addressed to said counsel for Respondent at his post office address of 840 One Main Place, Dallas, Texas 75250.

All parties required to be served have been served.

Dated: December 10, 1981.

WILLIAM D. SIMS

JENKENS & GILCHRIST
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(214) 653-4500
Counsel for Federal National Mortgage Association, Amicus Curiae

QUESTION PRESENTED

Section 67d(2) of the Bankruptcy Act provides that a trustee in bankruptcy may avoid a transfer (including mortgages) if the transfer occurs within one year prior to the petition in bankruptcy.

Can the foreclosure by a secured party of its lien rights pursuant to provisions in a validly executed and perfected mortgage instrument constitute a "transfer" for purposes of Section 67d(2) of the Bankruptcy Act when the perfection of the mortgage instrument is deemed a "transfer" under Section 67d(5) of the Bankruptcy Act?

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1. All parties to this proceeding are shown in the caption.

2. The Attorneys for Federal National Mortgage Association have on previous occasions and in matters unrelated to this proceeding represented the petitioner herein. As of December 10, 1981, the Attorneys for Amicus Curiae herein represent petitioner herein on matters unrelated to this proceeding.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinion Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of Case	2, 3
History of Amicus Curiae	3, 4, 5
Reason for Granting the Writ	5
(1) In Conflict with Applicable Decisions of this Court	5, 6, 7, 8, 9
(2) In Conflict with a Decision of Another United States Circuit Court of Appeals	9, 10, 11
(3) Contrary to the Plain Language of Section 67d(5)	11, 12, 13
(4) That Creates Precedent with Grave Implications and Potentially Disastrous Consequences to the Nation's Lending Institutions	13, 14, 15, 16, 17
Conclusion	17, 18
Certificate of Service	19

TABLE OF CONTENTS — (Continued)

Page

Appendix

Opinion and Judgment of the 5th Circuit Court of Appeals ..... app. A

Order and Decision of the United States District Court ..... app. B

Order Denying Petitioner's Petition for Rehearing and Suggestion for Rehearing en Banc ..... app. C

§ 67d of the Bankruptcy Act entitled "Liens and Fraudulent Transfers" (11 USC § 107) ..... app. D

§ 1(30) of the Bankruptcy Act entitled "Definitions" (11 U.S.C. § 1) ..... app. E

Durrett v. Washington National Insurance Company, 621 F.2d 201 (5th Cir. 1980) ..... app. F

Vernon's Texas Civil Statutes, Effect of Recording, Art. 6631 entitled "Deed, etc., Valid Against Subsequent Creditors" ..... app. G

§ 67f of Bankruptcy Act, 30 Stat. at L. 505, Chap. 541, U. S. Comp. Stat. 1901, p. 3418 ..... app. H

§ 67a of the Bankruptcy Act entitled "Liens and Fraudulent Transfers" (11 U.S.C. § 107) ..... app. I

Menear, Trustee v. Morgantown Community Association, Inc., 235 F.2d 354 (4th Cir. 1956) ..... app. J

Menear, Trustee v. Morgantown Community Association, Inc., 136 F. Supp. 292 (N.D.W.Va. 1955) ..... app. K

TABLE OF AUTHORITIES

Page

Cases

American Trust and Savings Bank v. Ruppe, 237 F. 581 (8th Cir. 1916) 8

Bushong v. Theard, 37 F.2d 690 (5th Cir.) *cert. denied* 281 U.S. 763 (1930) 8

Clarke v. Larremore, 188 U.S. 486 (1903) 7

Durrett v. Washington National Insurance Company, 621 F.2d 201 (5th Cir. 1980) ..... 3, 5, 13, 15, 16, 17, app.-F

Emil v. Hanley, 318 U.S. 515 (1943) 8

Eyster v. Gaff, 91 U.S. 521 (1875) 8

Globe Bank & Trust Company of Paducah, Kentucky v. Martin, Trustee, 236 U.S. 288 (1915) 7

In re Bowden, 274 F.Supp. 729 (D.Me. 1967) 8

In re Iroquois Utilities, Inc., 297 F. 397 (2d Cir. 1924) 8

In re Joyes, 290 F. 176 (6th Cir. 1923) 8

In re Maine State Raceways, 115 F.Supp. 263 (D.Me. 1953) 8

In re McKane, 152 F. 733 (E. D. N. Y. 1907) 8

In re Rohrer, 177 F. 381 (6th Cir. 1910) 8

In re Simpson, 31 F.2d 317 (D. Idaho 1929) aff'd 35 F.2d 840 (9th Cir. 1929) 8

Menear, Trustee v. Morgantown Community Association, Inc., 235 F.2d 354 (4th Cir. 1956) ..... 9, app.-J

Menear, Trustee v. Morgantown Community Association, Inc., 136 F.Supp. 292 (N.D. W. Va. 1955) ..... 10, app.-K

TABLE OF AUTHORITIES — (Continued)

Page

Metcalf Brothers & Co. v. Barker, 187 U.S. 165 (1902) 6, 7, 8, 13

Sexton v. Kessler & Company, 225 U.S. 90 (1912) 6

Straton v. New, 283 U.S. 318 (1931) 7, 8, 13

Statutes

11 U.S.C. § 1 (30), § 1 (30) Bankruptcy Act ..... 2, app.-E

11 U.S.C. § 107, § 67a Bankruptcy Act ..... 7, 10, app.-I

11 U.S.C. § 107, § 67d(2) Bankruptcy Act ..... 2, 10, 11, 12, app.-D

11 U.S.C § 107, § 67d(5) Bankruptcy Act ..... 2, 3, 10, 11, 12, 13, app.-D

11 U.S.C § 548, § 548 Bankruptcy Code (1978) 14

28 U.S.C. 1254(1) 2

U.S. Comp. Stat., 1901, p. 3418, § 67f Bankruptcy Act ..... app.-H

Vernon's Texas Civil Statutes, Article 6631 ..... 2, app.-G

Secondary Authorities

1 Collier Bankruptcy, 14th Ed., Section 263, p. 356 ..... 8, 9

Colletti, *A Title Insurer Looks at the Avoidance Provisions of the Bankruptcy Reform Act of 1978*, 15 Real Prop., Prob. & Tr. J. 588 (1980) 17

Pedowitz, *Title Problems in Bankruptcy*, 12 Real Prop., Prob. & Tr. J. 519, 520-21 (1977) 17

No. 81-903

In The

Supreme Court of the United States

October Term, 1981

LAKEWOOD BANK AND TRUST COMPANY,
Petitioner,

v.

HAROLD C. ABRAMSON, Trustee,
Respondent.

BRIEF OF THE FEDERAL NATIONAL MORTGAGE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Federal National Mortgage Association submits this brief as *Amicus Curiae* in support of Petitioner Lakewood Bank and Trust Company's prayer that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding June 10, 1981.

OPINION BELOW

The opinion of the Court of Appeals, reported at 647 F.2d 547 (5th Cir. 1981), appears in Appendix "A" hereto. The Order of the District Court appears in Appendix "B" hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered June 10, 1981. Timely petition for

rehearing en banc was denied August 14, 1981, and appears in Appendix "C" hereto. The petition for certiorari was filed on November 10, 1981. This *Amicus Curiae* brief was filed within thirty (30) days of that date. Jurisdiction exists pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Statutory Provisions involved are § 67d(2) and (5) of the Bankruptcy Act (11 U.S.C. § 107d(2) and (5), quoted in Appendix "D" hereto, stating criteria and specifying when "a transfer shall be deemed to have been made," and § 1(30) of the Bankruptcy Act (11 U.S.C. § 1(30)) quoted in Appendix "E" hereto, defining "transfer" under the Act. This case arose under the Bankruptcy Act prior to the effective date of the Bankruptcy Reform Act of 1978 (hereinafter the "Bankruptcy Code").

STATEMENT OF THE CASE

On July 30, 1975, Debtors executed and delivered to Petitioner Bank their promissory note in the principal amount of $74,000, secured by a deed of trust on 73 acres of land which was perfected pursuant to Article 6631 of Vernon's Texas Civil Statutes (*See* Appendix "G") on August 5, 1975.

On default by Debtors, a non-judicial foreclosure sale of the land was held August 3, 1976. On February 24, 1977, the Debtors filed their bankruptcy petition. Debtors' trustee in bankruptcy, Respondent herein, brought suit in the United States District Court to set aside the foreclosure sale as being a fraudulent transfer under § 67d(2) of the Bankruptcy Act (11 U.S.C. § 107d(2)), such sale having been completed within one year prior to the filing of the bankruptcy petition. Jurisdiction was under 11 U.S.C. § 46a.

The District Court ruled that Section 67d(5) of the Bankruptcy Act specified that the "transfer" was deemed to have been made upon perfecting of the deed of trust lien (August 5, 1975) eighteen months prior to filing the bankruptcy petition; therefore, the foreclosure sale was not subject to attack as a fraudulent conveyance.

Respondents concede that a "transfer" of the property occurred August 5, 1975, but assert that a second "transfer" also occurred by foreclosure sale seven months prior to filing the petition. A divided Court of Appeals for the Fifth Circuit agreed with Respondent, citing as the sole authority its own ruling in the case of *Durrett v. Washington National Insurance Company*, 621 F.2d 201 (5th Cir. 1980) (opinion attached in Appendix "F").

HISTORY OF AMICUS CURIAE

The Federal National Mortgage Association ("FNMA") is a corporation chartered under Section 302 of the National Housing Act, 12 U.S.C. § 1717. Although it is government chartered, FNMA is privately owned and managed, is a profit-making corporation and holds the largest residential mortgage portfolio in the United States. Its statutory purpose is to provide liquidity and stability to the home mortgage market through the purchase of residential mortgages in the so-called "secondary market". Thus, when mortgage funds are in short supply, FNMA purchases conventional, FHA, and VA insured mortgages held by "primary" lenders such as banks, savings and loan associations, and mortgage companies. These primary lenders, in turn, re-invest the money received from FNMA in new home mortgages and thereby increase the availability of mortgage funds to the public.

The importance of the secondary market and FNMA's role in that market is demonstrated by observing FNMA's mort-

gage buying activities for 1972-1976. In 1974, high inflation rates, a restrictive federal monetary policy and high yields available to purchasers of short-term money instruments contributed to the reduced availability of housing credit. Fewer homes were being built which resulted in more business failures in the home building industry and higher unemployment. To offset the spiral of high credit demand occasioned by these economic forces, FNMA purchased $6.3 billion in mortgage loans, of which $939 million were conventional mortgage loans. Additionally, in that year, over $2.3 billion in conventional mortgage commitments were issued by FNMA. Likewise, in 1976 FNMA purchased $1.75 billion in conventional mortgages from the Government National Mortgage Association that were made available for FNMA purchase by the Emergency Home Purchase Act of 1974. Thus, in times of economic need, FNMA has responded by buying mortgages when housing credit became severely restricted. Today, FNMA's loan portfolio exceeds $45 billion.

FNMA's purchase of mortgages in the secondary market is based on a consideration of the various risks associated with mortgages. When the risk associated with the purchase of mortgages in the secondary market increases, FNMA has less incentive to buy. The same is true with other purchases of mortgages in the secondary market. In order to reduce risk to itself, FNMA has developed a sophisticated mortgage purchase system which includes substantial credit checks on mortgagors, inquiry into the security's value, and the utilization of standardized contracts and mortgages nationwide.

For example, before FNMA purchases a mortgage from a primary lender, it must be satisfied that the mortgagor is financially sound and the security is adequate to prevent the need for a deficiency judgment should foreclosure become necessary. The primary lender from whom the mortgage is purchased makes the same determination when it originates

the loan. These investigations by FNMA and the primary lender are designed to reduce risk and to the extent risk is lessened, the lender is able to provide the borrowing public with more advantageous credit.

REASONS FOR GRANTING THE WRIT

THE COURT BELOW HAS DECIDED A QUESTION OF FEDERAL LAW (1) IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT; (2) IN CONFLICT WITH A DECISION OF ANOTHER UNITED STATES CIRCUIT COURT OF APPEALS; (3) CONTRARY TO THE PLAIN LANGUAGE OF SECTION 67d(5) OF THE BANKRUPTCY ACT, AND; (4) THAT CREATES PRECEDENT WITH GRAVE IMPLICATIONS AND POTENTIALLY DISASTROUS CONSEQUENCES TO THE NATION'S LENDING INSTITUTIONS.

(1) IN CONFLICT WITH APPLICABLE DECISIONS WITH THIS COURT:

Contrary to established interpretations by this Court, the United States Court of Appeals for the Fifth Circuit in *Abramson* concluded that non-judicial foreclosure sales within one year of the date a bankruptcy petition is filed are voidable as fraudulent "transfers" if made or incurred without "fair consideration". Relying solely on *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980) for its reasoning, the Court of Appeals again ignored the most important event in a mortgagor-mortgagee relationship; to wit, the execution of the mortgage instrument. Decisions of this Court hold differently.

The relevant principle of law accepted by this Court teaches that the date a lien is perfected controls when a transfer occurs regardless of when rights emanating from that lien are enforced. *See, e.g., Sexton v. Kessler & Company*, 225 U.S. 90 (1912). Beginning in 1902 with the decision in *Metcalf Brothers & Co. v. Barker*, 187 U.S. 165 (1902), this Court consistently has restrained a trustee in bankruptcy from attacking valid liens which were being enforced through pending court proceedings commenced prior to the filing of a debtor's petition in bankruptcy. In *Metcalf*, the trustee attempted to enjoin a state court proceeding in which a creditor sought to enforce a judgment lien against the bankrupt within the avoidance limitation period. In *Metcalf*, this Court concluded that a lien whose creation dates to a time outside the avoidance limitation period was protected from the trustee's injunctive relief regardless of when the lien creditor attempted to enforce such lien. The Court reasoned:

> "[i]n our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to the judgments creating liens. If this were not so the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial." *Id.* at 174.

In *Metcalf*, as in other cases set forth hereinbelow, this Court recognized that although a perfected lien is by its very

nature an immutable interest with unmatured remedies, the date and time of perfection of the lien (as dictated by state law, with the certainty it affords) was and still remains the logical time of "transfer".

Despite opportunities to do so, this Court has refused to abrogate this rule, instead choosing repeatedly to follow its reasoning. For example, in *Clarke v. Larremore*, 188 U.S. 486 (1903), this Court faced exactly the opposite fact situation as existed in *Metcalf*, i.e. one in which the creditor's lien originated with an action commenced within the avoidance limitation period. In *Clarke*, this Court reiterated its belief that enforcement by a creditor of a lien within the avoidance limitation period is not *per se* invalid, but required inquiry as to the lien's date of creation to determine its susceptibility to attack under Section 67d of the Bankruptcy Act. Consequently, in *Clarke*, the Court avoided the lien because the creditor instituted judicial proceedings to *establish* the lien during the lien avoidance period. Thus, the *Metcalf* rule applied but operated to defeat the creditor's claim of secured status.

Also, in *Globe Bank & Trust Company of Paducah, Kentucky, et al v. Martin, Trustee, et al*, 236 U.S. 288 (1915), this Court approvingly noted the rule of *Metcalf* and its application in *Clarke*. Similarly, in *Straton v. New*, 283 U.S. 318 (1931), liens acquired outside the avoidance limitation period were held valid despite enforcement that was commenced during the prohibited time frame. After reviewing the developed case law on this issue and noting that the trustee in *Metcalf* had asserted that creditors' liens were contingent and equitable until finally enforced, this Court in *Straton* concluded:

> "The Federal Courts have with practical unanimity held that where a judgment which constitutes a lien on

> the debtor's real estate is recovered more than four months prior to the filing of the petition, the Bankruptcy is without jurisdiction to enjoin the prosecution of the creditor's action, instituted prior to the filing of the petition in bankruptcy, to bring about a judicial sale of real estate." *Id.* at 326.

In support of this reasoning, this Court cited the following cases involving prosecutions of foreclosure proceedings under a mortgage as supporting the *Metcalf* rule: *Eyster v. Gaff*, 91 U.S. 521 (1875); *Bushong v. Thread*, 37 F.2d 690 (5th Cir.) *cert. denied* 281 U.S. 763 (1930); *In re Iroquois Utilities, Inc.*, 297 F. 397 (2d Cir. 1924); *In re Joyes*, 290 F.196 (6th Cir. 1923); and *In re Rohrer*, 177 F. 381 (6th Cir. 1910); *In re Simpson*, 31 F.2d 317 (D. Idaho) *aff'd* 35 F.2d 840 (9th Cir. 1929). Further, this Court in *Straton* cited an equally lengthy list of cases involving non-judicial foreclosures in support of the rule espoused in *Metcalf* that protects actions to enforce liens undertaken within the avoidance limitation period if the lien's creation antecedes the avoidance limitation period. Finally, as this Court noted in *Emil v. Hanley*, 318 U.S. 515 (1943), the decisions in the *Straton* and *Metcalf* cases, although interpreting Bankruptcy Act provisions later altered by the Chandler Act of 1938, nevertheless clearly established the conceptual rule to use when testing a lien's validity against the trustee's avoidance powers imposed by the bankruptcy laws. *See, e.g., American Trust and Savings Bank v. Ruppe*, 237 F. 581 (8th Cir. 1916); and *In re McKane*, 152 F. 733 (E.D.N.Y. 1907). *See also, In re Maine State Raceways*, 115 F.Supp. 263 (D.Me. 1953). *Cf. In re Bowden*, 274 F.Supp. 729 (D.Me. 1967). It is little wonder, therefore, that *Collier on Bankruptcy*, the leading secondary authority in the field of bankruptcy law, concluded that *Metcalf* and its progeny permit and legitimize

judicial and non-judicial mortgage foreclosures within the lien avoidance limitation period. *1 Collier on Bankruptcy*, 14th Ed., Section 2.63 at 356.

In light of this compendium of case law from this Court which, in all its variety, contains the common denominator that the date a lien is created, not when it is enforced, is the determinative date in establishing a "transfer" under the bankruptcy law, it is abundantly clear that the holding in *Abramson* is wrong. It ignores accepted precedent and causes a conflict which must be remedied.

(2) IN CONFLICT WITH ANOTHER UNITED STATES CIRCUIT COURT:

The holding of the United States Court of Appeals for the Fourth Circuit in *Menear, Trustee v. Morgantown Community Association, Inc.*, 235 F.2d 354 (4th Cir. 1956) (opinion attached in Appendix "J") cannot be rectified with the Fifth Circuit's holding in *Abramson* and consequently, mandates this Court's review of the decision in *Abramson*. It is notable that the Fifth Circuit ignored the *Menear* decision despite the fact that the District Court in *Abramson* cited *Menear* in holding that a foreclosure sale does not constitute a transfer.

In *Menear*, the trustee attempted to avoid a real property repurchase from the bankrupt by an option contract holder within one year from the date the petition in bankruptcy was filed. The option contract on which the repurchase was based was more than five years old by the time the bankrupt filed its petition. The question for review in *Menear*, as here, was "when did the transfer occur?"

The decision by the Fourth Circuit Court of Appeals affirmed the decision of the United States District Court,

reported in *Menear, Trustee v. Morgantown Community Association, Inc.*, 136 F. Supp. 292 (N.D.W.Va. 1955), (opinion attached as Appendix "K"), and the reasoning therein was incorporated by reference. 235 F.2d at 356. As noted by the District Court, the repurchase agreement was consummated in 1949 and memorialized immediately thereafter by recordation of a deed of trust. Five years later the vendor exercised its right to repurchase. Shortly thereafter, and within the fraudulent conveyance avoidance limitation period contained in Section 67d(2), a petition in bankruptcy was filed. The District Court ruled, however, that Section 67d(5) of the Bankruptcy Act controlled its determination of whether the recordation of the deed of trust or the repurchase pursuant to the contractual option constituted a transfer for purposes of Section 67d(2). Referring to the plain language of Section 67d(5), the District Court concluded:

> "The obligation was complete and amounted to a condition attached to the title of the real estate when the deed was recorded in 1949. Thereafter no bona fide purchaser from the debtor or its successor in title could take the property free of the retained right of repurchase. Therefore the obligation or transfer was incurred or made in 1949, more than one year prior to the filing of the petition in bankruptcy, and is thus excluded from the operation of Sec. 67, Sub. d(2) (a)." *Id.* at 296.

The District Court further noted:

> "At no time after entering into the contract and accepting the deed did Colonial [bankrupt] have any property right in the real estate free from the reserved right of repurchase. The Trustee is not vested with any better title or right to the bankrupt's property than belongs to the bankrupt or his creditors at the time the petition

in bankruptcy was filed. The ministerial act of conveyance by the special commissioner in 1954 did not create the transfer or the obligation to transfer, but the Court directing the execution in the deed merely recognized the obligation to convey as having arisen out of the transactions occuring in 1948 and 1949." *Id.*

By adopting the District Court's reasoning as set forth above, the Fourth Circuit concluded that an act performed pursuant to the terms of a validly recorded deed of trust did not constitute a "transfer" for purposes of Section 67d(2). The Fifth Circuit, when confronted with the identical issue, interpreted Section 67d(2) in a manner diametrically opposite, and when it refused to consider Section 67d(5) a conflict arose between the Circuits.

(3) CONTRARY TO THE PLAIN LANGUAGE OF 67d OF THE ACT:

An obligatory step in interpreting the meaning of any statute requires that all relevant and related statutory provisions be considered and applied. The Fifth Circuit Court of Appeals erred by considering only some necessary statutory provisions to the exclusion of others and, as a consequence, produced a doctrine that not only has no precedent, but also conflicts with the plain and uncomplicated meaning of Section 67d.

In *Abramson*, the Fifth Circuit initiated its review of Section 67d, and properly so, by paying homage to Section 1(30) which provides the definition of "transfer" in the Act. Rather than continuing this groundwork, the Circuit Court failed to consider the crucial provision contained in 67d(5) which, for purposes of 67d, excises extraneous events and

determines when a "transfer" actually occurs. Section 67d(5) provides:

> "(5) For the purposes of this subdivision d, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but, if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of such petition."

As is noted by reading the excerpt above, an unperfected deed of trust would be, for purposes of the statute, deemed perfected on the eve of the petition's filing. In the *Abramson* fact situation, the deed of trust was perfected over eighteen (18) months prior to the petition being filed and, consequently, established when the "transfer" was made. From the date of perfection (over eighteen [18] months prior to the petition date) until the date of petition, including after the foreclosure sale, a bona fide purchaser could not have acquired from the debtor rights in the property superior to the mortgagee's rights. This simple but necessary step in analyzing an action to determine whether it is voidable under Section 67d(2) demonstrates the clear error in *Abramson*. By the plain terms of Section 67d(5), the subsequent judicial or non-judicial sale pursuant to a perfected deed of trust cannot be a transfer.

Admittedly, the judicial or non-judicial foreclosure sale is an event which cannot be, and never has been, ignored by the courts. As noted above, however, time and time again this Court and others have sanctioned actions taken by creditors to enforce their rights obtained pursuant to a true transfer of an interest in the debtor's property or to

obtain the benefit of their transfer, even though these events occur during the avoidance limitation period. Consistent with these cases, is Section 67d(5) which has the effect of codifying the principle of *Metcalf* and *Straton* and requires its application in any Section 67d action.

(4) THAT CREATES PRECEDENT WITH GRAVE IMPLICATIONS AND POTENTIALLY DISASTROUS CONSEQUENCES TO THE NATION'S LENDING INSTITUTIONS:

The practical effect of *Abramson* on FNMA and the mortgage lending industry as a whole is telling. The decision enunciates a principle of law which, if not overturned, will severely restrict the availability of housing credit nationwide. As long as *Abramson* retains its precedental value regarding the ability of a debtor-in-possession or trustee to potentially unravel creditors' actions to enforce valid, perfected liens if such actions are taken within one year of the filing of a bankruptcy petition, sound business judgment will compel mortgage lenders to find new, less risky, sources of investment for its money. This will detrimentally affect not only the mortgage lenders and the general public seeking financing for home purchases, but will also have a substantial repercussive effect on the nation's economy. In today's times of record inflation and spiraling property costs it is quite easy to foresee numerous instances where a creditor seeking to enforce a valid and perfected lien, in order to be safe under the rationale espoused in *Abramson* and *Durrett*, would have to *pay money to the defaulting debtor* at foreclosure because the total unpaid amount of debt plus accrued interest did not exceed seventy percent (70%) of the property's "fair market value". Such a result and the undue hardship it places on creditors taxes the limits of credibility.

Now, after *Lakewood*, any foreclosure conducted by the creditor subjects a bona fide purchaser at foreclosure to potential liability under § 67d of the Bankruptcy Act or under § 548 of the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code") which retains, if not liberalizes, the trustee's fraudulent transfer avoidance powers. Now, for at least one year after the foreclosure sale and, if bankruptcy is filed within that year, for two additional years pursuant to the fraudulent transfer statute of limitations contained in the Bankruptcy Act and the Bankruptcy Code, the bona fide purchaser is burdened with the specter of the loss of his purchase.

Nor is there any rule of law for lenders to follow in order to minimize their risk. The Fifth Circuit Court of Appeals stresses in *Durrett* that it could not find any case in which a transfer of real property attacked under Section 67d of the Bankruptcy Act was approved for less than 70% of the market value of the property. Neither *Durrett* nor *Abramson* address whether the "70% Rule" will be altered when property values reach levels significantly greater than those posed in *Durrett or Abramson. See e.g., In re Madrid*, 10 B.R. 795 (Bk. Ct. D. Nev. 1981). Presumably, this "Rule", based on dicta, and which is a negative statement of fact as opposed to a positive rule of law, is that on which the mortgage industry is to conduct future operations.

Undoubtedly, mortgage lenders will be tempted to conduct property appraisals on the eve of foreclosure in order to generate evidence that "fair consideration" was given at the foreclosure sale. In light of the subjective nature of real property appraisals, coupled with the uncertainty of the "70% Rule", any comfort expected from the appraisals is not justified.

The lender's or foreclosure sale purchaser's potential liability will extend across the entire real estate credit spectrum. Simple economics dictates that when possible, the high risks now inherent in the mortgage lending market be passed onto the borrower. Although this certainly will be easier for the lender than the foreclosure sale purchaser, the risk associated with the *Durrett* doctrine will be nearly impossible to offset. As for the purchaser, his ability to absorb the costs of a fraudulent transfer action will vary according to his means, but his prospects for passing on the liability associated therewith is illusory.

The decisions in *Durrett and Abramson* will have a nationwide effect regardless of local procedures for foreclosing on security interests. The broad definition of "transfer" under the Bankruptcy Act (and as retained under the Bankruptcy Code), and the rationale of *Durrett* and *Abramson* not only suggests but compels the conclusion that *any* creditor action pursuant to a mortgage or security instrument which fully displaces the debtor's interest in property will constitute a transfer. Although FNMA does not accept the holding that foreclosures are transfers under bankruptcy law, it admits that no significant difference exists between a non-judicial or judicially sanctioned foreclosure sale when determining whether a "transfer" has taken place. Therefore, it is submitted by FNMA that the issue presented for this Court's consideration is not one limited to practices occurring in Texas or limited to practices pursued in the states comprising the Fifth Circuit. Rather, the issue, when decided, will be dispositive of secured lender practices nationwide.

As a result, fear will now govern future foreclosure sales, and no one will benefit, least of all the debtors who will now face greater potential deficiency judgments because of the chilling effect the *Lakewood* and *Durrett* decisions will have

on potential buyers at foreclosure sales. Rather than being trapped in a "no win" *Durrett* situation, many persons will refuse to bid at foreclosure sales. Those persons initially willing to bid may be ultimately frightened by warnings from the trustee under the deed of trust that potential fraudulent transfer liability exists. This disclosure, which must now be made to protect the trustee from claims of fraud, will drive down the price of property already undervalued by virtue of the lack of bidder interest. Furthermore, bidders normally interested in the property will ambivalently view the foreclosure sale as an exercise in futility in which a purchase at a "reasonable" price could be attacked as a fraudulent transfer just as easily as it could be criticized for bringing an exorbitant sum. Inevitably, the risks will become too great and longtime lenders in the housing credit market will move to safer markets or reduce or alter their lending practices.

As a natural reaction to the risk factor imposed by *Durrett* and *Abramson*, it is the opinion of the *Amicus Curiae* that lenders will reduce their dependence on real estate for collateral and instead will require collateral in the form of security with a readily ascertainable and undisputable value. For example, security such as certificates of deposit, "standby" letters of credit and the like will be required from more and more borrowers. Because few borrowers are financially capable to provide such security on their own account, it is believed that borrowing will become more restricted and fewer persons will be able to purchase into the housing market. It is believed that these changes and their resulting effects will cause the home building industry to experience a profound setback in its recovery efforts.

Lastly, it is interesting to note that nearly a century of bankruptcy practice passed before a case of *Durrett* or *Lake-*

wood's genre appeared. Circuit Judge Clark in *Abramson* found it incredulous that prior to *Durrett* the issue never came before a United States Circuit Court. 647 F.2d at 550. And respected commentators in the field of real estate title insurance, although long recognizing the severe consequences that a fraudulent transfer action by a trustee can have on a property's insurability, have heretofore ignored this problem with respect to actions taken by creditors to foreclose their liens on collateral pursuant to validly executed and perfected mortgage instruments. *See* Colletti, *A Title Insurer Looks at the Avoidance Provisions of the Bankruptcy Reform Act of 1978*, 15 Real Prop., Prob. & Tr. J. 588 (1980); Pedowitz, *Title Problems in Bankruptcy*, 12 Real Prop., Prob. & Tr. J. 519, 520-21 (1977).

CONCLUSION

An immutable concept and principle of bankruptcy law long accepted has been that when "transfers" are "deemed to be made" determines whether a trustee or debtor-in-possession can attack the "transfer" under the fraudulent transfer provision of bankruptcy law. The Fifth Circuit has ignored this fundamental principle that is historically ensconsed in our bankruptcy laws and ruled that actions to enforce rights granted pursuant to the actual "transfer" constitute a second and separate "transfer" susceptible to attack under the fraudulent transfer provisions of the Bankruptcy Act.

This decision by the Fifth Circuit flies in the face of established legal precedent emanating from this Court, is in direct conflict with existing decisions from the Fourth Circuit and, is contra to the plain language of the relevant provision of the Bankruptcy Act. Of equal importance is

the fact that it undermines the security of the vast bulk of loans that have been made by our nation's lenders and renders uncertain lenders' abilities to anticipate their losses through foreclosure in the event of the borrowers' defaults.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

William D. Sims
Jenkens & Gilchrist
2200 First National Bank Bldg.
Dallas, Texas 75202
214/653-4500
Counsel for Federal National Mortgage Association, Amicus Curiae

CERTIFICATE OF SERVICE

The undersigned, counsel for Federal National Mortgage Association, a member of the Bar of the Supreme Court of the United States, certifies that counsel for Petitioner, William L. Bedard, and counsel for Respondent, Philip I. Palmer, Jr., have been served with three copies of the foregoing brief in support of petition for Writ of Certiorari, by depositing the documents in a United States Post Office or mailbox, with first class postage prepaid, addressed to said counsel for Petitioner at his post office address, 5400 First International Building, Dallas, Texas 75270, and addressed to said counsel for Respondent at his post office address, 840 One Main Place, Dallas, Texas 75250.

All parties required to be served have been served.

Dated: December 10, 1981.

WILLIAM D. SIMS
JENKENS & GILCHRIST
2200 First National Bank Bldg.
Dallas, Texas 75202
214/653-4500
Counsel for Federal National Mortgage Association, Amicus Curiae

HAROLD C. ABRAMSON, Trustee,
Plaintiff-Appellant,

v.

LAKEWOOD BANK AND TRUST COMPANY,
Defendant-Appellee.

No. 79-1592.

United States Court of Appeals,
Fifth Circuit.

June 10, 1981

Trustee in bankruptcy brought suit to have foreclosure sale declared a fraudulent transfer under Bankruptcy Act. The United States District Court for the Northern District of Texas, at Dallas, Robert W. Porter, J., granted summary judgment for bank and refused to set aside alleged transfer, and trustee appealed. The Court of Appeals held that bank's nonjudicial foreclosure sale was a "transfer" within meaning of Bankruptcy Act, and as transfer occurred within one-year period prior to date of filing of bankruptcy petition, it was subject to being set aside as fraudulent if it was made without fair consideration.

Reversed and remanded.

Thomas A. Clark, Circuit Judge, dissented and filed opinion.

Bankruptcy — 165 (3.2)

Bank's nonjudicial foreclosure sale was a "transfer" within meaning of Bankruptcy Act, and as transfer occurred within one-year period prior to date of filing of bankruptcy petition, it was subject to being set aside as fraudulent if it was made without fair consideration. Bankr.Act, §§ 1(30), 107(d)(2), 11 U.S.C.A. §§ 1(30), 107(d)(2).

See publication Words and Phrases for other judicial constructions and definitions.

Philip L. Palmer, Jr., Dallas, Tex., for plaintiff-appellant.

Storey, Armstrong, Steger & Martin, William L. Bedard, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GODBOLD, Chief Judge, SIMPSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

This is an appeal by Harold C. Abramson, acting as trustee in bankruptcy under Chapter XI of the old Bankruptcy Act,[1] former 11 U.S.C. § 1, *et seq.*, of the district court's order refusing to set aside an alleged transfer of real property within one year of the filing of debtor's bankruptcy petition. The district court granted summary judgment for the defendant-appellee, Lakewood Bank and Trust Company ("Lakewood Bank"), holding that the non-judicial foreclosure sale of the debtor's land did not constitute a "transfer" within the meaning of § 67 (d) of the Bankruptcy Act. We reverse.

The facts can be stated briefly. The appellant, Abramson, brought this action in his capacity as court appointed trustee in the bankruptcy of Frank L. Johnson and Nina P. Johnson. The appellee, Lakewood Bank, is a Dallas bank. The

[1]The foreclosure sale of the property under attack here occurred August 3, 1976. Appellant filed a petition under Chapter XI of the Bankruptcy Act on February 24, 1977. Sec. 403(a) of Pub.L. No. 95-598, Title I (Nov. 6, 1978), 92 Stat. 2549 provides as follows:

> A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act [Pub.L. 95-598] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

Since the events giving rise to this lawsuit occurred before the effective date of the new Bankruptcy Act the rights of the parties herein are governed by "repealed Title XI." When reference is made in this opinion to the "Act" or the "Bankruptcy Act" this same shall refer to "repealed Title XI."

bankrupts owned seventy-three acres of land in Kaufman County, Texas. In August of 1975, the bankrupts borrowed $74,000 on an installment loan. This loan was secured by a conventional deed of trust in favor of the bank on the seventy-three acres.

The deed of trust was recorded by the bank on August 5, 1975. When the bankrupts were unable to fulfill their financial obligations to the Lakewood Bank, a foreclosure sale was held on August 3, 1976, at which time the Lakewood Bank, through its agent Louis McClain, purchased the property for $65,000 cash. At the time of the foreclosure sale, the bankrupts owed approximately $71,000 on the mortgage. On February 24, 1977, the Johnsons filed a petition to be adjudicated bankrupt in the United States Bankruptcy Court for the Northern District of Texas.

The Trustee brought this action in March, 1978, to have the August, 1976, foreclosure sale declared a fraudulent transfer under § 67(d) of the Bankruptcy Act. While the deed of trust had been executed more than one year prior to the date of the filing of the bankruptcy petition, the actual foreclosure sale occurred less than seven months before the filing. Section 67(d)(2) provided that "[e]very *transfer* made and every obligation incurred by a debtor within one year prior to the filing" of the bankruptcy petition "is fraudulent . . . as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent." 11 U.S.C. § 107(d)(2) (1966) (current version at 11 U.S.C. § 548(a)(1978)) (emphasis supplied).

In granting summary judgment for the Lakewood Bank, the district court held that for purposes of the Bankruptcy Act, there was only one "transfer" in this case and that it "occurred at the latest on August 5, 1975, more than 18 months prior to the adjudication of bankruptcy."

More than a year after the issuance of the district court's ruling in the *Abramson case*, this court of appeals decided

the remarkably similar case of *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980). As to the narrow issue before us on this appeal, i. e., whether the bank's non-judicial foreclosure sale constituted a "transfer" within the meaning of the Act, we consider the holding in *Durrett* as controlling.

The word "transfer" was defined in Section 1 of the Act as including:

> the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.

11 U.S.C. § 1(30).[2]

In *Durrett*, this court held that a Texas non-judicial foreclosure sale constituted a transfer within the meaning of § 67(d). There, a deed of trust to secure debt had been executed in 1969. In January, 1977, some nine days prior to the debtor's filing for bankruptcy, the trustee in the deed of trust sold the property at a non-judicial foreclosure sale as authorized by the deed of trust and Texas law. The debtor in possession under Chapter XI of the Bankruptcy Act brought suit to set aside the sale of the property as a voidable transfer.

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[2]The current version of the definition of transfer is located at 11 U.S.C. § 101(40):

"transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest.

In considering whether the foreclosure sale was a "transfer" made by the debtor in possession, a panel of this court set forth the definition of "transfer" and wrote:

> The comprehensive character of this definition leads us to conclude that the transfer of title to the real property of the debtor in possession pursuant to an arrangement under Chapter XI of the Act, by a trustee on foreclosure of a deed of trust, to a purchaser at the sale constitutes a "transfer" by debtor in possession within the purview of section 67(d). The actual transfer of title was made by Durrett to Fields, as trustee, via the deed of trust, executed April 7, 1969, to secure an indebtedness then owing to Southern and thereafter assigned to Washington. Possession of the property was retained by Durrett subject to the power of the trustee to sell and deliver possession of the property, on default, at a foreclosure sale. While the actual conveyance of title by Durrett was made on April 7, 1969, possession was retained until foreclosure of the deed of trust. The "transfer" within the contemplation of the Act, was not final until the day of the foreclosure sale, January 4, 1977. This was accomplished within the one-year period provided by section 67(d)(2), 11 U.S.C. § 107(d)(2).

Durrett v. Washington National Insurance Co., 621 F.2d at 204.

Accordingly, the foreclosure sale of the Johnsons' seventy-three acres was also a transfer within the meaning of the Act. As this transfer occurred within the one-year period, it is subject to being set aside as fraudulent if it was made without fair consideration. Therefore we reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

THOMAS A. CLARK, Circuit Judge, dissenting:

I dissent. Although I recognize our panel is bound by *Durrett v. Washington National Insurance Co.*, 621 F.2d 201

(5th Cir. 1980), *Durrett* is simply wrong in its holding that a foreclosure sale is a transfer within the meaning of § 67(d). Subparagraph (2) of that section of the former Bankruptcy Act reads in part as follows:

> Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent . . . if made or incurred without fair consideration by a debtor . . . without regard to his actual intent; . . .

11 U.S.C. § 107(d)(2).

A foreclosure sale by a mortgagee or trustee is not a transfer *by* the debtor, although done in his name pursuant to a power of sale in the mortgage or deed of trust. The debtor's act which triggers foreclosure is the failure to fulfill some obligation in the promissory note which is secured by the mortgage or deed of trust. The creditor than declares the obligation due, forecloses, and sells at a public sale to the highest bidder. The mortgagor-trustor/bankrupt does nothing but default — that cannot be translated into a "transfer." It is not a voluntary conveyance on his part. The power of sale vested in the mortgagee or trustee, when coupled with an interest as here, is a valuable property right acquired by that party at the time of the execution of the initial mortgage or trust deed.[1] When that time is more than twelve months before the filing of the bankruptcy petition, the power of sale is vested absolutely in the mortgagee or trustee.

It is basic mortgage law that at the time of the foreclosure sale the purchaser (who may or may not be the mortgagee or trustee) takes the same title to the property which the

[1]Technically a mortgage does not contain a power of sale, while a deed of trust or deed to secure debt does contain such a power. However, in common parlance the generic term "mortgage" embraces all forms of instruments creating a lien on realty for the purpose of securing a debt. Many contain powers of sale in order to avoid court proceedings which are necessary in strict mortgage states.

mortgagor or trustor had at the time of the initial mortgage or trust deed, subject only to property taxes (and perhaps some statutory intervening limitations as changes in zoning, etc., and the right of redemption by the mortgagee with a specified number of days granted statutorily in some states), and free and clear of any intervening liens or mortgages placed against the property by the debtor or any judgment creditor.

By our decision here and in *Durrett* we cast a cloud upon mortgages and trust deeds. Foreclosure within twelve months before a filing creates a sale voidable by a trustee in bankruptcy if the public sale did not bring a "fair consideration." It is generally known that such sales do not bring the best price, but most states, including Texas, mandate public sales when foreclosure is the creditor's remedy. Many states, but not Texas, prohibit a deficiency judgment against the debtor unless the mortgagee obtains confirmation of the sale through a court proceeding where the fairness of the consideration is adjudicated.[2] Thus in those states a mortgagee who did not obtain judicial confirmation would be prohibited from filing a claim in the bankruptcy proceeding for the amount of the deficiency.

The cloud created over mortgages and trust deeds by making foreclosure sales subject to being voided by a bankruptcy trustee will naturally inhibit a purchaser other than the mortgagee from buying at foreclosure. This tends to depress further the prices of foreclosure sales and thus increase the potential size of the deficiency in each foreclosure in all six states comprising this circuit.

It is interesting to me that *Durrett* is the first case treating this problem — after 90 years of bankruptcy law and mortgages of a time greater than the memory of man. It again establishes what an imaginative lawyer can do when he adds persuasion.

I would affirm.

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[2] *See, e.g., Ga.Code Ann.* § *67-1503* (confirmation of foreclosure sales under powers).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HAROLD C. ABRAMSON,
Trustee,

vs. No. CA3-78-0281-F

LAKEWOOD BANK AND
TRUST COMPANY,

ORDER

FACTS

On July 30, 1975, Frank L. Johnson and Nina P. Johnson executed and delivered to Lakewood their promissory note in the principal amount of $74,000.00. This was secured by a deed of trust covering 73 acres of land located in Kaufman County, Texas which was simultaneously executed and delivered by the Johnsons to Lakewood, and filed for record in the Deed of Trust Records of Kaufman County, Texas, on August 5, 1975 at 10:05 a.m. (Vol. 221, page 843, Deed of Trust Records of Kaufman County, Texas).

On July 3, 1976, the Johnsons were notified by Lakewood that they had failed to make payment and that the note was in default. Notice was posted and a foreclosure sale was held on August 3, 1976, at which time, Lakewood, by its representative Louis McClain, purchased the property for $65,000.00 cash. On February 24, 1977, the Johnsons filed a petition to be adjudicated bankrupt in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division.

ISSUE BEFORE THE COURT

The parties are in essential agreement as to the facts just stated. They disagree about the time when the 73 acre tract

of land was "transferred" by the Johnsons to Lakewood. Lakewood contends that the "transfer", as that term is used in the Bankruptcy Act and defined in § 1(30) and § 67(d), occurred at the latest on August 5, 1975 when the deed of trust was recorded in the records of Kaufman County, Texas. The trustee apparently concedes, on page 2 of its brief in opposition to defendant's motion for summary judgment filed June 2, 1978, that a "transfer" did occur on that date. Trustee, however, contends that this is not the "transfer" which the Trustee attacks in this cause of action. Trustee alleges that another "transfer" occurred on August 3, 1976 when the property was sold at a foreclosure sale.

The fixing of the date of "transfer" is significant because if Lakewood is correct, the "transfer" by the Johnsons to Lakewood of the deed of trust cannot be attacked under the Bankruptcy Act as a fraudulent conveyance. If the Trustee is correct, however, the foreclosure sale might be set aside under the fraudulent conveyance provisions.

THE COURT'S DECISION

Section 67(d)(5) of the Bankruptcy Act provides that for the purposes of subdivision d, "a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter acquired any right in the property so transferred superior to the right of the transferee therein . . ." Section 1(30) of the Bankruptcy Act further provides, in defining the word "transfer" that a transfer includes the fixing of a lien upon property, a security, a lien, or the retention of a security title to property delivered to a debtor.

In this case, no bonafide purchaser from the Johnsons would have acquired a right in the 73 acres superior to that of Lakewood from and after the date of the execution, delivery, and recordation of the deed of trust. Therefore, the "transfer" occurred at the latest on August 5, 1975, more than 18 months prior to the adjudication of bankruptcy, and plaintiff has no cause of action as a matter of law against Lakewood Bank & Trust Co. in this case. My decision is

supported by *Menear, Trustee vs. Morgantown Community Association*, 235 F.2d 354 (4th Cir. 1956). In that case a bankrupt executed a deed of trust on the real estate to secure an indebtedness due the association. The deed of trust was properly recorded, and was filed several years prior to bankruptcy. A creditor retained an option to repurchase the property at a future time of its choosing for a sum certain. Within one year of the bankruptcy, the creditor exercised its option to repurchase the property and reconveyance was accomplished by a State Court appointed Commission pursuant to an order of the Court. The Trustee attacked the conveyance but the Circuit Court found for the creditor and refused to disturb the reconveyance of the property pursuant to the option contract of the parties. While this case involved an option to repurchase, and not a foreclosure sale, I think the principle is analogous to the situation in this case.

The Trustee has argued strenuously that there should be two "transfers", one which occurred when the Johnsons granted Lakewood Bank a security interest in the property and another "transfer" which occurred through the sale of the property at foreclosure. The Trustee has cited no case authority to the Court which would justify this position and the language of the Bankruptcy Act suggests that in this type of case there is only one "transfer".

The motion of Lakewood Bank & Trust Co. for summary judgment is hereby GRANTED.

It is so ORDERED.

/s/ ROBERT W. PORTER
United States District Judge

Date: February 15, 1979

Appendix C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-1592

HAROLD C. ABRAMSON, Trustee,
Plaintiff-Appellant,

v.

LAKEWOOD BANK AND TRUST COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 10, 1981, 5 Cir., 198 , ... F.2d .....).

(August 14, 1981)

Before GODBOLD, Chief Judge, SIMPSON and THOMAS A. CLARK, *Circuit Judges.*

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor

of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

Entered for the Court:

THOMAS A. CLARK
United States Circuit Judge

SECTION SIXTY-SEVEN (11 U.S.C. § 107)

§ 67. Liens and Fraudulent Transfers.

d. (1) For the purposes of, and exclusively applicable to, this subdivision d: (a) "Property" of a debtor shall include only his nonexempt property; (b) "debt" is any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent; (c) "creditor" is a person in whose favor a debt exists; (d) a person is "insolvent" when the present fair salable value of his property is less than the amount required to pay his debts; and to determine whether a partnership is insolvent, there shall be added to the partnership property, the present fair salable value of the separate property of each general partner in excess of the amount required to pay his separate debts, and also the amount realizable on any unpaid subscription to the partnership of each limited partner; and (e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained.

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or

transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; or (c) as to then existing and future creditors, if made or incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature; or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.

(3) Every transfer made and every obligation incurred by a debtor who is or will thereby be rendered insolvent, within four months prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent, as to then existing and future creditors: (a) if made or incurred in contemplation of the filing of a petition initiating a proceeding under this Act by or against the debtor or in contemplation of liquidation of all or the greater portion of the debtor's property, with intent to use the consideration obtained for such transfer or obligation to enable any creditor of such debtor to obtain a greater percentage of his debt than some other creditor of the same class, and (b) if the transferee or obligee of such transfer or obligation, at the time of such transfer or obligation, knew or believed that the debtor intended to make such use of such consideration. The remedies of the trustee for the avoidance of such transfer or obligation and of any ensuing preference shall be cumulative: *Provided, however,* That the trustee shall be entitled to only one satisfaction with respect thereto.

(4) Every transaction of partnership property and every partnership obligation incurred within one year prior to the filing of a petition initiating a proceeding under this Act by or against the partnership, when the partnership is insolvent or will be thereby rendered insolvent, is fraudulent as to partnership creditors existing at the time of such transfer or obligation, without regard to actual intent if made or incurred (a) to a partner, whether with or without a promise by him to pay partnership debts, or (b) to a person not a

partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

(5) For the purposes of this subdivision d, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but, if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of such petition.

(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this Act, which is fraudulent under this subdivision d against creditors of such debtor having claims provable under this Act, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value: *Provided, however,* That the court may, on due notice, order such transfer or obligation to be preserved for the benefit of the estate, and, in such event, the trustee shall succeed to and may enforce the rights of such transferee or obligee: *And provided further,* That such purchaser, lienor, or obligee, who without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision d, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment.

THE BANKRUPTCY STATUTE OF 1898

ENACTED JULY 2, 1898

AS AMENDED TO OCTOBER 1, 1973

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Bankruptcy Act". (*This Short Title was added by* 64 STAT. 1113 (1950)).

CHAPTER I

Definitions

SECTION ONE (11 U.S.C. § 1)

§ 1. Meaning of Words and Phrases. The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

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(30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;

J. W. DURRETT, SR., Plaintiff-Appellant,

v.

The WASHINGTON NATIONAL INSURANCE Co., et al., Defendants-Appellees.

No. 78-3351

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

July 11, 1980.

Debtor in possession under Chapter XI of Bankruptcy Act sought to set aside and vacate an alleged transfer of real property effectuated nine days prior to filing of petition for arrangement, charging that transfer was voidable. The United States District Court for the Northern District of Texas, William M. Taylor, Jr., J., 460 F.Supp. 52, denied relief, and appeal was taken. The Court of Appeals, Orma R. Smith, District Judge, sitting by designation, held that: (1) payment of $115,000 for transfer of property under deed of trust pursuant to foreclosure sale was not "fair" consideration or a "fair equivalent" within meaning of section of Bankruptcy Act governing fraudulent transfers, and (2) transfer accomplished by trustee pursuant to power of sale provision of deed of trust was a "transfer made" by debtor in possession within contemplation of section of Bankruptcy Act governing fraudulent transfer.

Judgment vacated; remanded with directions.

1. Bankruptcy 181

Payment of $115,000 for transfer of property under deed of trust pursuant to foreclosure sale was not "fair" consideration or a "fair equivalent" within meaning of section of Bankruptcy Act governing fraudulent transfers. Bankr.Act, § 67(d)(1), (e)(1), 11 U.S.C.A. § 107(d)(1), (e)(1).

See publication Words and Phrases for other judicial constructions and definitions.

2. Bankruptcy 958

Transfer of title to real property of debtor in possession pursuant to arrangement under Chapter XI of Bankruptcy Act, by trustee on foreclosure of deed of trust, to purchaser at sale constituted a "transfer made" by debtor in possession within purview of section of Bankruptcy Act governing fraudulent transfers. Bankr.Act, § 67(d), 11 U.S.C.A. § 107(d).

See publication Words and Phrases for other judicial constructions and definitions.

Philip I. Palmer, Jr., Dallas, Tex., for plaintiff-appellant.

Larry G. Alexander, Edith DeBusk, Dallas, Tex., for Jack Mitchell.

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN and POLITZ, Circuit Judges, and SMITH*, District Judge.

ORMA R. SMITH, District Judge:

This appeal concerns an action instituted in the United States District Court for the Northern District of Texas, wherein plaintiff Jack W. Durrett, Sr. (herein "Durrett"), acting as debtor in possession under Chapter XI of the Bankruptcy Act,[1] 11 U.S.C. §§ 701, et seq., seeks to set aside

*District Judge of the Northern District of Mississippi, sitting by designation.

[1]The sale of the property under attack here, occurred January 4, 1977. Plaintiff filed a Petition for Arrangement Under Chapter XI of the Bankruptcy Act on January 13, 1977). Section 403(a) of Pub.L. No. 95-598, Title 1 (Nov. 6, 1978), 92 Stat. 2549; provides as follows:

A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be con-

(Continued on next page)

and vacate an alleged transfer of real property effectuated nine days prior to the filing of a Petition for an Arrangement under Chapter XI. Durrett charges that the transfer is voidable under section 67(d) of the Act, 11 U.S.C. § 107(d)[2]. The district court held that the non-judicial sale involved in the litigation constituted a transfer within the meaning of section 67(d). However, the court determined that the amount paid by the purchaser at the sale con-

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ducted and determined under such Act as if this Act [Pub.L. 95-598] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

Because the acts giving rise to this litigation occured before the effective date of the new bankruptcy act, Pub.L. 95-598, the rights of the litigants are governed by "Repealed Title 11". When reference is made herein to the "Act" or the "Bankruptcy Act" the same shall refer to "Repealed Title 11".

[2]Section 67(d) of the Act provides in pertinent part:

(1) For the purposes of, and exclusively applicable to, this subdivision: ... (e) consideration given for the property or obligation of a debtor is "fair" (i) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred ....

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; ...

(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this title, which is fraudulent under this subdivision against creditors of such debtor having claims provable under this title, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value: ...

And provided further, That such purchaser, lienor, or obligee, who without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment. ... (Emphasis in original).

ducted by a trustee in the foreclosure of a deed of trust executed by Durrett, the indebtedness which it secured being than in default, was a "fair" consideration and a "fair equivalent" within the meaning of section 67(d)(1), (e)(1) of the Act, 11 U.S.C. § 107(d)(1), (e)(1). The court denied the relief sought by Durrett and he appeals. We reverse.

A review of the record on appeal reflects the following facts. On April 7, 1969, Durrett executed a note in the amount of $180,000.00 in favor of Southern Trust and Mortgage Company (hereafter "Southern"). The note was secured by a deed of trust upon the subject real property. Southern, on April 7, 1969, assigned the trust deed and note to defendant, The Washington National Insurance Company (hereafter "Washington"). Defendant J. H. Fields, Jr. (hereafter "Fields"), was named as the trustee in the deed of trust. The deed of trust contained a provision for a public sale of the real property thereby conveyed, in case of default in payment of the indebtedness.

On December 13, 1976, Fields, in his capacity of trustee, posted the property for foreclosure sale. The sale was held on January 4, 1977. Defendant Shannon Mitchell, Sr. (hereafter "Mitchell"), appeared at the sale and bid the sum of $115,400.00 for the property. This was the only bid received by the trustee at the sale. The amount of the bid was the exact amount necessary to liquidate the indebtedness secured by the deed of trust. Upon receipt of the bid price, Fields executed and delivered to Mitchell a trustee's deed to the property. The parties agree that Mitchell did not have any actual fraudulent intent when making the purchase. He responded to the notice of sale and became the successful bidder. Mitchell and Durrett are the only parties now interested in the case.

Durrett contends that the transfer of the property, pursuant to foreclosure of the deed of trust, is voidable under the provision of section 67(d).

The district court dismissed the complaint after a non-jury trial. In its findings of fact, the court held that the

fair market value of the property on January 4, 1977, the date of the foreclosure sale, was the sum of $200,000.00.

The parties do not take issue with this finding. Both agree that it is not clearly erroneous. *See*, Rule 52(a), Fed.R.-Civ.P.; *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 377 (5th Cir. 1977).

Durrett asserts, on appeal, only one assignment of error, i.e., "Is $115,400.00 payment for an asset worth $200,000.00, a 'fair equivalent' ".

In consideration of the issue of "fair equivalent", we should determine by what standard we are to judge the district court's conclusion of law that the amount paid for the property, $115,000,000.00, is "fair" consideration and a "fair equivalent" within the meaning of section 67(d)(1), (e)(1).[3]

We have held that our review of conclusions of law by the district court in non-jury cases is not restricted by the "clearly erroneous" rule and will be reversed if incorrect. *See, Ealy v. Littlejohn*, 569 F.2d 219, 229 n. 31 (5th Cir. 1978). *See also, Buchanan v. United States Postal Service*, 508 F.2d 259, 267 n. 24 (5th Cir. 1975).

The question with which we are confronted is whether the district court's conclusion of law on the "fair equivalent" issue is incorrect, when considered in light of the record made in the district court and the applicable case law.

[1] The parties have cited a number of cases which deal with this issue. A great percentage of these, however, involve factual situations quite different from the facts which exists in this appeal. Here, there is involved only one event, i.e., one parcel of real estate sold at a foreclosure sale for a price which is approximately 57.7 percent of the fair market value

[3]The district court's conclusion of law refers to Mitchell's payment as being the sum of $115,000.00. The finding of fact, however, stated the payment to be $115,400.00. The record reflects the latter to be the correct bid price.

of the property. Is the price paid a "fair equivalent" for the transfer of the property? We hold that it is not.

The sale of real property was involved in one of the cases cited by Durrett, *Schafer v. Hammond*, 456 F.2d 15 (10th Cir. 1972). There the Tenth Circuit affirmed a holding by the district court that a sale of real property for approximately 50 percent of its market value was void for lack of a fair consideration. Here, Mitchell paid slightly more than 50 percent (57.7%) for the property involved. The sale, however, deprived the bankruptcy estate of an equity in the property of $84,600.00, if computed on the $200,000.00 market value fixed by the district court.

We have been unable to locate a decision of any district or appellate court dealing only with a transfer of real property as the subject of attack under section 67(d) of the Act, which has approved the transfer for less than 70 percent of the market value of the property.

Assuming, arguendo, that we should review the district court's conclusion of law as a finding of fact under the "clearly erroneous" standard, the results would be the same. We cannot affirm the district court on this issue. Our review of the entire evidence leaves us with a definite and firm conviction that the price which Mitchell paid for the property at the trustee's sale was not a "fair equivalent" for the property. Under such circumstances, it is our duty to declare the transfer voidable under section 67(d). *See, United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948); *George W. B. Bryson & Co., Ltd. v. Norton Lilly & Co., Inc.*, 502 F.2d 1045, 1049 (5th Cir. 1974). *See also, Tulia Feedlot, Inc. v. United States*, 513 F.2d 800, 807 (5th Cir.), *cert. denied*, 423 U.S. 947, 96 S.Ct. 362, 46 L.Ed.2d 281 (1975); *Ealy v. Littlejohn, supra* at 229 n. 30.

The defendant-appellee Mitchell seeks to sustain the final judgment of the district court on the ground that the transfer accomplished by the trustee pursuant to the power of sale provision of the deed of trust was not a transfer *made*

by the debtor in possession within the contemplation of section 67(d). We find this position to be without merit.

The word "transfer" is defined in section 1 of the Act, 11 U.S.C. § 1. Section 1 provides in pertiment part:

> The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:
>
> (30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise, the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;

[2] The comprehensive character of this definition leads us to conclude that the transfer of title to the real property of the debtor in possession pursuant to an arrangement under Chapter XI of the Act, by a trustee on foreclosure of a deed of trust, to a purchaser at the sale constitutes a "transfer" by debtor in possession within the purview of section 67(d). The actual transfer of title was made by Durrett to Fields, as trustee, via the deed of trust, executed April 7, 1969, to secure an indebtedness then owing to Southern and thereafter assigned to Washington. Possession of the property was retained by Durrett subject to the power of the trustee to sell and deliver possession of the property, on default, at a foreclosure sale. While the actual conveyance of title by Durrett was made on April 7, 1969, possession was retained until foreclosure of the deed of trust. The "transfer" within the contemplation of the Act, was not final until the day of the foreclosure sale, January 4, 1977. This was accomplished within the one-year period provided by section 67(d)(2), 11 U.S.C. § 107(d)(2). This conclusion

is supported by reliable and ample authority. *See* 1 Collier on Bankruptcy, § 1.30 at 130.28(2)(3) (14th ed. 1967), where it is said: "[t]he present definition covers not only alienations of title but includes surrender of possession". *See also*, 4 Collier on Bankruptcy, § 67.29 at 471, et seq.

For the reasons herein given, the judgment of the district court must be vacated, and the cause reversed with directions.

Upon remand, the district court shall enter judgment for plaintiff-appellant, directing the rescission of the transfer under section 67(d) of the Act, dealing with the property in such manner as will protect Mitchell's equity therein. Section 67(d)(6), 11 U.S.C. § 107(d)(6).

JUDGMENT VACATED, REMANDED WITH DIRECTIONS.

VERNON'S TEXAS CIVIL STATUTES

EFFECT OF RECORDING

Art. 6631. [6828] [4612] [4334] Deed, etc., valid against subsequent creditors

Every conveyance, covenant, agreement, deed, deed of trust or mortgage or certified copies of any such original conveyance, covenant, agreement, deed, deed of trust or mortgage copied from the deed or mortgage records of any county in the State where the same has been regularly recorded, although the land may not have been situated in the county where such instrument was recorded, and which shall have been acknowledged, proved or certified according to law, may be recorded in the county where the land lies; and when delivered to the clerk of the proper court to be recorded shall take effect and be valid as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors from the time when such instrument shall have been so acknowledged, proved or certified and delivered to such clerk to be recorded, and from that time only. All certified copies filed and recorded under the provisions of this article shall take effect and be in force from the time such certified copy was filed for record. Nothing herein shall be construed to validate an invalid instrument.

Acts 1895, p. 157; P.D. 4994; G.L. vol. 10, p. 887.

Section 67f provides: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien *shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect." [30 Stat. at L. 505, chap 541, U.S. Comp. Stat. 1901, p. 3418.]

SECTION SIXTY-SEVEN (11 U.S.C. § 107)

§ 67. Liens and Fraudulent Transfers. a. (1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this Act: *Provided, however,* That if such person is not finally adjudged a bankrupt in any proceeding under this Act and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it had not been nullified and voided.

(2) If any lien deemed null and void under the provisions of paragraph (1) of this subdivision a, has been dissolved by the furnishing of a bond or other obligation, the surety on which has been indemnified directly or indirectly by the transfer of or the creation of a lien upon any of the nonexempt property of a person before the filing of a petition initiating a proceeding under this Act by or against him, such indemnifying transfer or lien shall also be deemed null and void: *Provided, however,* That if such person is not finally adjudged a bankrupt in any proceeding under this Act, and if no arrangement or plan is proposed and confirmed, such transfer or lien shall be deemed reinstated with the same effect as if it had not been nullified and voided.

(3) The property affected by any lien deemed null and void under the provisions of paragraphs (1) and (2) of this subdivision a shall be discharged from such lien, and such property and any of the indemnifying property transferred to or for the benefit of a surety shall pass to the trustee or debtor, as the case may be, except that the court may on due notice order any such lien to be preserved for the benefit of the estate, and the court may direct such conveyance as

may be proper or adequate to evidence the title thereto of the trustee or debtor, as the case may be: *Provided, however,* That the title of a bona-fide purchaser of such property shall be valid, but if such title is acquired otherwise than at a judicial sale held to enforce such lien, it shall be valid only to the extent of the present consideration paid for such property.

(4) The court shall have summary jurisdiction of any proceeding by the trustee or debtor, as the case may be, to hear and determine the rights of any parties under this subdivision a. Due notice of any hearing in such proceeding shall be given to all parties in interest, including the obligee of a releasing bond or other like obligation. Where an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, the court, upon application of any party in interest, shall in the same proceeding ascertain the value of such property or lien, and if such value is less than the amount for which such property is indemnity or than the amount of such lien, the transferee or lienholder may elect to retain such property or lien upon payment of its value, as ascertained by the court, to the trustee or debtor, as the case may be, within such reasonable times as the court shall fix.

(5) The liability of a surety under a releasing bond or other like obligation shall be discharged to the extent of the value of the indemnifying property recovered or the indemnifying lien nullified and voided by the trustee or debtor, or, where the property is retained pursuant to the provisions of paragraph (4) of this subdivision a, to the extent of the amount paid to the trustee or debtor.

ELZA M. MENEAR,
Trustee in Bankruptcy of Colonial Candy Corporation,
a Bankrupt, Appellant,

v.

MORGANTOWN COMMUNITY ASSOCIATION, INC.,
a West Virginia Corporation,
George R. Farmer, as Special Commissioner in the suit of
Rockwood & Company, et al., v. Colonial Candy Corporation,
and Robert T. Donley, Trustee, Appellees.

No. 7181.

United States Court of Appeals
Fourth Circuit.
Argued June 11, 1956.
Decided July 17, 1956.

Action by trustee in bankruptcy to set aside a conveyance of realty by a commissioner of a state court under such court's order. The United States District Court for the Northern District of West Virginia, at Fairmount, Harry E. Watkins, J., 136 F.Supp. 292 entered an order dismissing the action and trustee appealed. The Court of Appeals held that where deed was executed by commissioner of a state court in compliance with a valid contract affecting the title to property of a bankrupt, duly recorded several years prior to bankruptcy, it was not subject to attack under the Bankruptcy Act notwithstanding the fact that it was executed within one year of bankruptcy.

Affirmed.

1. Bankruptcy — 177

Where a deed to certain realty in which bankrupt had an interest was executed by a commissioner of a state court in compliance with recorded valid contract affecting the title to such property several years prior to bankruptcy, it was not subject to attack under the Bankruptcy Act

notwithstanding the fact it was executed within a year of bankrupt's bankruptcy. Bankr.Act, § 67, sub. d(2) (a), 11 U.S.C.A. § 107, sub. d(2) (a).

2. Bankruptcy — 175

Where there was no allegation and nothing to show anything fraudulent in connection with a conveyance to bankrupt with option to repurchase title, executed several years before bankruptcy, mere fact that one of the claims against bankrupt was in existence at the time of such conveyance would not destroy the validity of conveyance made pursuant to repurchase option. Bankr.Act, § 67, sub. d(2) (a), 11 U.S.C.A. § 107, sub. d(2) (a).

Glenn Hunter, Morgantown, W. Va. (Charles McCamic, Wheeling, W. Va., on brief), for appellant.

George R. Farmer, Morgantown, W. Va., for appellee.

Before PARKER, Chief Judge, and BARKSDALE and BRYAN, District Judges.

PER CURIAM.

[1] This is an appeal from an order dismissing an action by a trustee in bankruptcy to set aside a conveyance of real estate which had been made to the Morgantown Community Association by a commissioner of a state court and under its order. The conveyance was executed within less than a year of the bankruptcy and the trustee in bankruptcy asked that it be set aside under the provisions of 67, sub. d(2) (a) of the Bankruptcy Act, 11 U.S.C.A. § 107 sub. d(2) (a). It appeared, however, that the association, the grantee under the deed of conveyance, had been the owner of the property and had conveyed it to the bankrupt several years before in a deed containing an option to repurchase. Bankrupt executed at the same time a deed of trust on the real estate to secure an indebtedness due the association; and this deed of trust referred to the option to purchase. Both deed and

deed of trust were promptly recorded. Subsequently, but more than two years before the bankruptcy, a lien creditors' bill was filed in a state court against the bankrupt, and the association asserted therein its rights under the option to repurchase and elected to exercise the option. The matter was contested in the state court and an order was entered sustaining the position of the association and appointing a commissioner to make deed pursuant to the terms of the repurchase option. The deed so made is the one which the trustee in bankruptcy seeks to set aside. It is perfectly clear, however, that although the deed was executed by the commissioner of the state court within a year of the bankruptcy, it was executed in compliance with a valid contract affecting the title to the property, and duly recorded, made several years prior thereto. This being true, it was not subject to attack under the Bankruptcy Act but should be sustained for reasons adequately stated in the opinion of the District Court, where the facts are set forth in detail. See Menear v. Morgantown Community Association, D.C., 136 F.Supp. 292.

[2] Attention is called to the fact that one of the claims against the bankrupt was in existence in 1949 when the conveyance to bankrupt with option to repurchase was executed; but this is immaterial. There is no allegation and nothing to show that there was anything fraudulent in connection with that transaction.

Affirmed.

ELZA M. MENEAR,
Trustee in Bankruptcy of Colonial Candy Corporation,
a Corporation, Bankrupt, Plaintiff,

v.

MORGANTOWN COMMUNITY ASSOCIATION, INC.,
a West Virginia Corporation, Defendant.

No. 439-F.

United States District Court
N. D. West Virginia, Fairmont Division

Dec. 1, 1955.

Action by bankruptcy trustee to set aside deed. The District Court, Harry E. Watkins, Chief Judge, held that, in directing execution of deed of reconveyance, state court, which had upheld validity of repurchase option, merely recognized contractual obligation, and that obligation having been incurred more than one year prior to filing of petition in bankruptcy, the ministerial act of conveyance by Special Commissioner of State Court could not be deemed "fraudulent", even though made within one year prior to filing of petition in bankruptcy.

Relief denied and action dismissed.

1. Bankruptcy — 177

In directing execution of deed of reconveyance, state court, which had upheld validity of repurchase option, merely recognized contractual obligation, and that obligation having been incurred more than one year prior to filing of petition in bankruptcy, the ministerial act of conveyance by Special Commissioner of State Court could not be deemed "fraudulent", even though made within one year prior to filing of petition in bankruptcy. Bankr.Act, § 67, sub. d(2, 5), 11 U.S.C.A. § 107, sub. d(2, 5).

2. Bankruptcy — 151

Bankruptcy trustee is not vested with any better title or right to bankrupt's property than belonged to bankrupt or his creditors at time petition in bankruptcy was filed.

Charles McCamic, Wheeling, W. Va., and Glenn Hunter, Morgantown, W. Va., for plaintiff.

George Farmer, Morgantown, W. Va., for defendant.

WATKINS, Chief Judge.

This action has been brought by the Trustee in Bankruptcy of Colonial Candy Corporation, to set aside a deed made by George R. Farmer, a Special Commissioner of the Circuit Court of Monongalia County, West Virginia to the defendant, Morgantown Community Association, on February 10, 1954, 48 days prior to the filing of the petition in bankruptcy. The deed was executed and delivered, and the sale confirmed pursuant to decree of the state court in a judgment lien creditors' suit against Colonial Candy Corporation. The plaintiff claims that this state court deed must be set aside under Section 67, sub. d(2) (a) of the Bankruptcy Act, 11 U.S.C.A. § 107 sub. d(2) (a), because it was made within one year prior to filing the petition in bankruptcy, without a fair consideration by a debtor who was then insolvent, and that such deed is fraudulent as a matter of law, without regard to the intent of the parties, and notwithstanding the fact that the sale had been made and confirmed by prior decree of the state court. The defendant says that Sec. 67, sub. d(2) (a) is not applicable to the facts in this case because here the real transfer or obligation was made and incurred more than one year prior to filing the petition in bankruptcy. The defendant says that the decree entered in the state court did not create the obligation relied upon by defendant to secure the decree of sale in the state court, but that the state court merely recognized and established a transfer or obligation which was made and incurred in 1948 more than one year prior to the filing of the petition in bankruptcy on March 30, 1954.

In 1947 the Carnegie-Illinois Steel Company closed its plant at Morgantown, W. Va. Being desirous of helping the community where it had operated for more than a third of a century, and desirous of furnishing employment to its former employees, it conducted negotiations with the Morgantown Chamber of Commerce with a view of giving its plant site to the community for industrial use. Carnegie-Illinois agreed to convey title to its property consisting of more than 20 acres upon certain conditions. One condition was that a non-profit community corporation be chartered to take title to such real estate. Another condition was that the property must be used exclusively for industrial purposes, and that the grantee would see that the property would never fall into the hands of anyone who would attempt to use any part of it for other than industrial purposes; and that it would be used to furnish employment for former employees. The site was peculiarly adapted to industrial use, being the only available industrial site in the urban area. The steel company had opportunity to sell to others but felt an obligation to its employees and the community. The defendant, Morgantown Community Association, a non-profit corporation, was organized and chartered to take title to the property and to carry out the conditions of transfer, after which a deed was executed and delivered. Both parties agreed that these conditions would not be put into the deed but that they would be carried out by the grantee. Soon thereafter Community entered into negotiations with Colonial Candy Company whereby Community agreed to lease a part of the real estate (Parcel (a)) to Colonial and Colonial promised to erect a manufacturing plant having a value of not less than $20,000. The lease was for five years at a monthly rental of $360 per month, or $4,320 annually, which would amortize the $20,000 loan, with interest at 3.2 per cent, in five years. If the building when completed was found to be worth $20,000, Colonial was to convey the building to Community in return for the loan of $20,000 which was to be repaid in five years in the form of rent. At the end of five years title to land and building was to be conveyed to Colonial. If the land and building were not used by Colonial for candy manufacturing and Colonial ceased to engage in

that business, Community had the right to repurchase the same for depreciated value of the building or $25,000, whichever was the lesser sum. Community explained to Colonial on more than one occasion the reason for such repurchase agreement, and why it must see that the property be used for industrial purposes only. If Colonial failed to meet the monthly payments of rental, it agreed to surrender peaceful possession of the real estate and the agreement to convey the same would be cancelled. Such a lease agreement was signed June 1, 1948 and recorded June 4, 1948. No specifications or plans for the building were agreed upon and the type of building was left to Colonial. Community had no control over the type of building or the amount of money expended thereon.

Colonial built the building but paid only one month's rent. Much time elapsed, and then, at Colonial's request, Community conveyed to Colonial by deed dated September 15, 1949, recorded September 27, 1949, the land and building, retaining a vendor's lien for the balance due. The sum of $5,000 was agreed upon as a fair price for the land. Community had opportunities to sell the property to others without the repurchase condition, but did not do so because of its understanding with Carnegie-Illinois. Up to this time title to the property had remained in Community, but Colonial said it needed title to the property in order to issue more stock. In addition to the vendor's lien a deed of trust was executed by Colonial to secure the balance due to Community. The deed contained the same condition or reservation of right of repurchase which was contained in the lease. The deed of trust which was recorded with the deed mentioned the condition or reservation of repurchase and referred to the deed for a more particular description of such condition or reservation. From time to time thereafter as Colonial encountered more financial trouble it discussed the possibility of refinancing through the R.F.C. and asked Community to surrender its reservation for repurchase, which request was denied.

In December, 1951, Rockwood, a lien creditor, brought a judgment lien creditors' suit against Colonial in the Circuit

Court of Monongalia County, W. Va., the primary purpose of which was to subject the assets of Colonial to the payment of its debts. The bill and amended bill specifically alleged the deed of conveyance from Community to Colonial dated September 15, 1949, and charged that the condition or reservation of repurchase contained therein was void, and asked "that the Court construe the optional provision contained in the deed" and for general relief. In its answer Community denied that the condition or reservation of repurchase was void and alleged that it had exercised its option to repurchase the property after it had learned that such property was no longer being used by Colonial for its candy manufacturing business and had served a notice of such election upon Colonial, but that Colonial was unable to convey the property because of such creditors' suit; further alleged that it was willing to comply with the terms of the option and to pay the purchase money by paying the difference between the repurchase price of $25,000 and the balance then owing by Colonial upon the original purchase price which was then secured by first lien on the property; further asserted the execution of the original lease and deed thereafter at the request of Colonial; asserted that neither the plaintiff nor any other creditor of Colonial had been injured thereby; and prayed that a decree be entered conveying the property to it. The defendant Colonial was served with process and appeared in the suit by its counsel.

The case was referred to a commissioner who gave notice to creditors, heard proof of claims, and took much testimony with reference to the validity of the option to repurchase. He reported to the court that the option was void because (1) it was not authorized by the board of directors of Colonial, (2) not supported by consideration and not under seal, and (3) it results in unjust enrichment of Community at expense of Colonial. Plaintiff and many other creditors excepted to the rulings of the commissioner holding the option valid in certain other respects, and Community excepted to the rulings holding the option void for the reason stated above.

By decree entered July 30, 1953, the state court overruled the exceptions of pl intiff and other creditors and sustained the exceptions of Community and held the option valid. The decree also ordered the real estate in controversy to be conveyed to Community for the purchase price of $25,000 but deducting therefrom the unpaid purchase money owing and secured by first lien on the property and taxes owing and unpaid, and directed the residue of the purchase money to be paid into court and appointed George R. Farmer Special Commissioner to make the conveyance.

On motion of the plaintiff and many of the defendants such final decree was suspended for a period of ninety days to enable the parties to apply to the Supreme Court of Appeals of West Virginia for an appeal and supersedeas to that part of the decree that upholds such option and directs its enforcement. Thereafter such parties made three several applications for appeal, all of which were refused. More than eight months having elapsed since the entry of such decree, the same is no longer appealable.

On March 30, 1954, some of the creditors who were unsuccessful in the state court proceeding to have the option to repurchase declared void, filed an involuntary petition in bankruptcy against Colonial, and after a trustee in bankruptcy was appointed, these same creditors filed a petition with the Referee in Bankruptcy asking permission of the Referee to bring this action in this court to have the deed to Community set aside because it was made without fair consideration and within one year prior to filing the petition in bankruptcy. Such authorization was granted. The plaintiff in this action who is the Trustee in Bankruptcy is represented by the same attorney who brought the creditors' suit in the state court, who applied for the appeal in the West Virginia Supreme Court of Appeals and who filed the petition before the referee for authority to bring this suit. In this action the plaintiff alleges the same grounds which were alleged in the state court. In both actions plaintiff claimed that the repurchase agreement was void and should be set aside because not authorized by the board of direc-

tors; that it was without fair consideration; and that it resulted in unjust enrichment to Community at the expense of Colonial. The creditors who filed the petition in bankruptcy filed their claims in the state court action, and such claims were adjudicated by the final decree of the state court. They were all parties to the state court action by voluntarily appearing and proving their claims, and all of them filed exceptions to the report of the commissioner in chancery. In the state court action the common creditors filed their claims and they were adjudicated, the personal property of Colonial was sold and the surplus of the money from the sale of all property after payment of liens is now being held by the state court to be turned over to the Trustee in Bankruptcy to apply on common claims.

After the time for appeal expired George R. Farmer, Special Commissioner, conveyed the property to Community on February 10, 1954. His actions were reported to the court on February 11, 1954, the sale was confirmed by the court, and on the same day he delivered the deed to Community as directed by the court, which deed was recorded on February 12, 1954, prior to the filing of the petition in bankruptcy on March 30, 1954.

Section 67, sub. d(2) of the Bankruptcy Act provides:

> "Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; * * *."

Section 67, sub. d(5) provides that for the purpose of subdivision d "a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein * * *."

When Colonial accepted the deed made in conformity to the original lease agreement it "incurred" an obligation to reconvey the property upon the happening of a future event. Had this obligation or transfer occurred within one year prior to the filing of a petition against Colonial, and had this obligation so incurred been for less than fair consideration by a debtor who was or who would be thereby rendered insolvent, it would have been fraudulent as to creditors existing at the time of such transfer and obligation, and could be set aside. The obligation was complete and amounted to a condition attached to the title of the real estate when the deed was recorded in 1949. Thereafter no bona fide purchaser from the debtor or its successor in title could take the property free of the retained right of repurchase. Therefore the obligation or transfer was incurred or made in 1949, more than one year prior to the filing of the petition in bankruptcy, and is thus excluded from the operation of Sec. 67, sub. d(2) (a).

[1, 2] Plaintiff bases his case upon the erroneous assumption that the obligation or transfer contemplated by Section 67 in this case, was incurred or made in 1954 when the Special Commissioner made his deed to Community under the state court decree. At no time after entering into the contract and accepting the deed did Colonial have any property right in the real estate free from the reserved right of repurchase. The trustee is not vested with any better title or right to the bankrupt's property than belongs to the bankrupt or his creditors at the time the petition in bankruptcy was filed. The ministerial act of conveyance by the Special Commissioner in 1954 did not create the transfer or the obligation to transfer, but the court in directing the execution of the deed merely recognized the obligation to convey as having arisen out of transactions occurring in 1948 and 1949. The case of Mulhern v. Albin, 8 Cir., 163 F.2d 41, 43, is directly on point. In that case an uncle brought a suit against his niece in the state court, claiming that he had an equitable lien for purchase money paid by him on land owned by the niece. After trial a decree was entered

awarding him a judgment in rem against the land and execution through sale to satisfy the judgment. Within less than four months from the entry of the decree the niece was in bankruptcy and it was claimed that the uncle's lien on the land was void under Sec. 67 of the Bankruptcy Act, as amended, because less than four months intervened between the rendition of the decree in the state court and the date of bankruptcy. The court said:

> "* * * The decree which was entered in the state court suit between the uncle and the niece did not create the equitable lien of the uncle but recognized and established it as existing in equity by reason of the transactions through which the niece became vested with the legal title subject to the uncle's equitable lien and the decree provided execution to enforce the rights of the parties as it found them to exist in equity. * * * The rights of the parties in respect to the lands in question were determined by the circumstances of the transactions occurring between the parties in 1942, some three years before the decree date. The niece never acquired a title superior to the equitable lien of the uncle. * * *
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> "In our opinion the conclusion to be drawn from this language (section 67, sub. f) is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise a judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so that date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial."

In Pearson v. Rapstine, 5 Cir., 203 F. 2d 313, 315, a chattel mortgage was given on personalty of a bakery business and duly recorded in October, 1949. An insurance policy was taken out with a loss payable clause to the mortgagee. A fire occurred in 1950 and in February, 1951 the mortgagee brought suit in the state court against the mortgagor to foreclose the mortgage lien, and in May, 1951 the state court granted the relief sought and ordered the insurer to pay mortgagee. The judgment was docketed in June, 1951, and on the same date mortgagor filed a voluntary petition in bankruptcy. The trustee who was thereafter appointed, claimed that the state court judgment was a "void and fraudulent" preference as against other creditors, and asked that it be set aside under Sec. 67 of the Bankruptcy Act. The court held:

> "Then lien held by the mortgagee did not originate with the state court decree entered on June 1, 1951. That decree simply enforced a preexisting lien dating from October 1, 1949 when the mortgage was executed, and a contract right dating from March 19, 1950, when the insurance policy was issued. The lien enforced by the state court was therefore not one 'obtained' within four months of bankruptcy, as contemplated by sec. 67, sub. a of the Bankruptcy Act."

Although the trustee was not a party to the state court proceeding in Pearson v. Rapstine, the court held that where judgment of the state court in favor of a mortgagee in action against a mortgagor and insurer to recover proceeds of fire policy became final and no appeal was taken, judgment was res judicata in bankruptcy proceeding of mortgagor wherein trustee in bankruptcy sought proceeds of policy. To the same effect see In re Estes, D.C.N.D.Tex., 105 F. Supp. 761.

In Rader v. Star Mill & Elevator Co., 8 Cir., 258 F. 599, the court held that a vendor's lien on property of a bankrupt, although established in a state court proceeding by a decree rendered within four months prior to bankruptcy, is not one obtained through legal proceedings, and consequently was

not defeated by Sec. 67 of the Bankruptcy Act. In the same case the court held that a decree against a corporation, which was subsequently adjudicated a bankrupt, establishing and foreclosing a vendor's lien on real estate, estops the bankrupt, its trustee, and general creditors from asserting or maintaining, not only every matter offered, but also every admissible matter that might have been offered, in the foreclosure suit to defeat the plaintiff's claim.

In Union Joint Stock Land Bank of Detroit, Mich. v. Byers, 3 Cir., 100 F.2d 82, it was held that the fact that judgment recovered on widow's dower charge against land, which had been conveyed to bankrupt subject to dower interest, was obtained within four months of bankruptcy, could not affect judgment's validity, since judgment did not establish a new lien but merely adjudicated an existing one.

In 6 Am.Jur. 1124, it is said:

> "The trustee has no greater right to attack a foreclosure sale which was completed prior to bankruptcy than the bankrupt himself would have had in the absence of bankruptcy, except as the proceedings may have been a cloak for a transaction voidable under the Bankruptcy Act. The prevailing view is that jurisdiction over mortgaged premises having been acquired by the institution of foreclosure proceedings in state court, the subsequent bankruptcy of the mortgagor does not divest the state court of its jurisdiction. Thus, where the mortgagor is, during the foreclosure, declared a bankrupt, his trustee in bankruptcy takes the title, subject to such foreclosure proceedings, and his rights are foreclosed by the subsequent decree of sale. * * *"

For the reasons stated above, the Trustee in Bankruptcy is bound by the decree of the state court. Plaintiff does not charge that the decree of the state court was obtained by fraud, the sole charge being that the "transfer" ordered therein was fraudulent because not based on a fair consideration. On this matter the state court has fixed the rights

of the bankrupt in the property. The state court had taken jurisdiction of the res involved in a suit to enforce liens thereon and to determine the rights of Community therein in December, 1951 and had fully and finally adjudicated all matters pertaining to the rights of the parties in this property in July, 1953, and nothing thereafter remained to be done but the ministerial act of carrying out the terms of the decree. If this court would set aside the conveyance by the Special Commissioner, the trustee could not sell the property free of the right of Community to acquire the same upon payment of the $25,000 purchase price and free of the right of Community to credit against that price the first lien indebtedness owing by Colonial.

If Sec. 67, sub. d(2) (a) were otherwise applicable here, there is no allegation in the complaint and no evidence in the record to show that any now unsatisfied claims were in existence at the time the obligation was incurred in 1949. Sec. 67 specifically provides that such obligation or transfer is fraudulent only as to creditors whose claims existed at the time the transfer was made or the obligation incurred.

While the state court has already decided the fairness of the original transaction between Community and Colonial and the fairness of the conveyance by the Special Commissioner to Community, there is nothing in this record to show that either transaction was without fair consideration. On the contrary the evidence shows the fairness of both, and this court would so hold if it had jurisdiction to determine the question of fair consideration.

The evidence shows that while some $92,000 was spent in constructing the building, that when the building was completed, it was in very poor condition. It was poorly constructed and not adaptable for use. It had no heating system, no sprinkler system, insufficient ventilation, insufficient plumbing and lighting and the roof was not even waterproof. One witness testified that when the building was completed Community would have been better off to have its lot and $20,000 back than to have the lot with the building thereon.

No evidence was offered by the plaintiff as to the value of the property at the time of the deed to Colonial in 1949, or as to its value on the day the commissioner made his deed. When the property was deeded to Community in 1954 by the Special Commissioner, the building was in even worse condition and it was necessary for Community to spend the sum of $26,037.76 thereon to make it tenantable for rental purposes. This money was spent prior to bankruptcy and in good faith, at a time when no suit was pending attacking its title. The total cost of the building and land to Community is the sum of $51,037.76 and it is now being rented for an annual rental of $7,361.16, under a lease whereby Community must pay the taxes and the lessee is given option for many more years without any increase in the rent. The evidence shows that the lien debts, with interest to March 1, 1953 were $93,110.01, and the total of common debts was $15,737.21. With the addition of more interest on the lien debts, it is clear that there is no possible equity in the property for common creditors. Seizure and sale of this property by the trustee would only result in additional trustee commissions and counsel fees without any benefit to creditors.

Throughout its brief counsel for the plaintiff have proceeded upon the theory that the original condition or reservation of repurchase is not a provable debt in bankruptcy; that it was merged with the deed of trust, and was thereby extinguished, and was of no consequence or effect. These contentions are wholly without merit. I have examined the many cases cited in plaintiff's brief and find that all of them can be distinguished from the facts of this case.

For the reasons stated the relief asked in the complaint is denied and the action is dismissed at the cost of the plaintiff.